Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR., INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP.,
Debtors-In-Possession.

UNARCO BLOOMINGTON FACTORY WORKERS,
Petitioners,

v.

UNR INDUSTRIES, INC., et al.,
Debtors-Respondent,

and

TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. QUESTIONS PRESENTED

A. Whether the Court of Appeals violated "Separation of Powers" by abstaining from Petitioners' appeals of UNR's bankruptcy reorganization, asserting that activated reorganization plans enjoy "Holder In Due Course" status, despite Petitioners' statutory right to the appeals.

B. Whether Article III of the Constitution of the United States and the Bankruptcy Code permit a federal court to bind unidentified, future victims of asbestos exposure to a company's reorganization plan.

II. PARTIES

Petitioners are (hereinafter referred to as "Workers"):

Edith M. Babb, individually and as administrator of the Estate of Joseph I. Babb, deceased; Dorothy Betts, individually and as administrator of the Estate of Elijah S. Betts, deceased; Terry Grabill, administrator of the Estate of Bernita Bragonier, deceased; Helen Bratcher, individually and as administrator of the Estate of Rya E. Bratcher, deceased; William Cochran; Robert R. Day; Raymond E. Deitz; Wilha C. Dietrich; William J. Dugan, administrator of the Estate of Merle Dugan, deceased; Dewey Durbin; Joseph I. Finfrock; William L. Gray; Phyllis Gruber, individually and as administrator of the Estate of Charles W. Gruber, deceased; John V. Handley; Margaret Harmon, individually and as administrator of the Estate of Thomas R. Harmon, deceased; Lee E. Hayes; Jerry D. Heck; Walter W. Lehr; Jarvis Long; Retha McCandless, individually and as administrator of the Estate of Uvell P. McCandless, deceased; Michael J. McGuire; Geneva Eileen Mau, individually and as administrator of the Estate of William R. Mau, Sr., deceased; Juan Mendiola; Patty J. Miller, individually and as administrator of the Estate of James H. Miller, deceased; Donald P. Murphy; Gladys Nevious, individually and as administrator of the Estate of Ernest L. Nevious, deceased; Ben W. Paul; Robert Poe; Clyde E. Price; Betty J. Redman, individually and as administrator of the Estate of George Redman, deceased; Neal R. Ring, individually and as administrator of the Estate of Molly Ring, deceased; Gerald Ringo, individually and as administrator of the Estate of Tracy E. Ringo, deceased, Jerry Sampson, individually and as administrator of the Estate of Raymond H. Sampson, deceased; Joyce Schultz, individually and as administrator of the Estate of Calvin P. Schultz, deceased; Chlora Skinner, individually and as administrator of the Estate of Robert D. Skinner, deceased; Mary I. Smith, individually and as administrator of the Estate of Wesley H. Smith, deceased; John Spicer; Delora Stewart, individually

and as administrator of the Estate of William P. Stewart, deceased; Vernadine T. Thacker, individually and as administrator of the Estate of Charles A. Thacker, deceased; Lois J. Thacker, individually and as administrator of the Estate of Leslie D. Thacker, deceased; Evelyn Tynan, individually and as administrator of the Estate of William P. Tynan, deceased; Robert Van Dorn; John H. Wehmeier; William Wilder; Peoples Bank of Bloomington, administrator of the Estate of Walter Winkelmann, deceased; and Anna Wojtczak, individually and as administrator of the Estate of Eugen Wojtczak, deceased.

Respondents Are:

(1) Debtor: UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP, and

(2) TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST.

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V. OPINIONS DELIVERED IN THIS PROCEEDING BY OTHER COURTS

A. *In the Matter of: UNR Industries, Inc., et al., Debtors. Appeals of: Unarco Bloomington Factory Workers*, 1994 U.S. App. LEXIS 12519 (Rehearing Denied); Exhibit A to Petitioners' Appendix ("Workers' App.")

B. *In the Matter of: UNR Industries, Inc., et al., Debtors.*, 20 F.3d 766 (7th Cir. 1994); Workers' App. at C

C. *In re UNR Industries*, 725 F.2d 1111 (7th Cir. 1984); Workers' App. at D

D. *In re UNR Industries*, 165 B.R. 198 (N.D.Ill. 1993); Workers' App. at F

E. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, No. 89 C 5220 (N.D.Ill. 1992); Workers' App. at N

F. *Unarco Bloomington Factory Workers v. UNR Industries*, 124 B.R. 268 (N.D.Ill. 1990); Workers' App. at G

G. *In re: UNR Industries*, 29 B.R. 741 (N.D.Ill. 1983); Workers' App. at H

H. *In re UNR Industries*, 143 B.R. 506 (Bkrtcy N.D.Ill. 1992).

I. *In re UNR Industries*, 46 B.R. 671 (Bkrtcy N.D. Ill. 1985); Workers' App. at I

VI. STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on April 5, 1994. The judgment was final in that it affirmed the result, but not the reasoning, of the district court's dismissal of Workers' appeals from UNR's Plan of reorganization, the injunction supplementing the Plan, and the Asbestos

Disease Trust. The Seventh Circuit's decision was final and terminated Workers' appeals. *In the Matter of: UNR Industries, Inc., et al., Debtors.*, 20 F.3d 766 (7th Cir. 1994). Workers filed a petition for rehearing which was denied on May 27, 1994. *In the Matter of: UNR Industries, Inc., et al., Debtors. Appeals of : Unarco Bloomington Factory Workers*, 1994 U.S. App. LEXIS 12519 (Order, Rehearing Denied). Workers seek review of this decision by writ of certiorari pursuant to 28 U.S.C. § 1254.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Full Text Located at Exhibit O, Workers' Appendix)

A. United States Constitution

1. Article I, §§ 1 and 8
2. Article III, §§ 1 and 2

B. United States Code

1. 28 U.S.C. § 1254
2. 28 U.S.C. § 1291
3. 28 U.S.C. § 1331
4. 28 U.S.C. § 1334
5. 28 U.S.C. § 158
6. 11 U.S.C. § 101(5)
7. 11 U.S.C. § 105
8. 11 U.S.C. § 363(m)
9. 11 U.S.C. § 1129

VIII. STATEMENT OF THE CASE

A. Description of Parties

Petitioners are individually named on page ii herein, and hereinafter will be referred to collectively as "Workers". Workers are creditors of Chapter 11 Debtor UNR Industries, its predecessors and related entities. Workers' claims result from employee exposure to asbestos at UNARCO's Bloomington, Illinois plant, which manufactured asbestos products from the early 1950's through 1970. All 48 Workers were diagnosed as contracting asbestos disease prior to the time Debtors filed their Chapter 11 petitions in 1982.

The Respondents are (1) UNR Industries and its subsidiaries, including UNARCO Industries, (collectively referred to as "UNR"), which filed for Chapter 11 bankruptcy relief on or about July 29, 1982, and (2) the Trustees of the UNR Asbestos Disease Trust.

B. Basis for Federal Appeals Jurisdiction

1. District Court Jurisdiction

UNR filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code on July 29, 1982. On June 1 and 2, 1989 the Bankruptcy Court entered a final order confirming UNR's Plan of reorganization, a permanent injunction as a condition precedent of the Plan, and UNR's Asbestos-Disease Claims Trust, By Laws and Claims Resolution Procedures ("Trust"). On July 9, 1989, Workers appealed these orders to the district court, pursuant to 28 U.S.C. § 158(a). On or about December 6, 1990, the district court entered certain findings, but remanded the issue of classification of Workers' claims against UNR to the bankruptcy court, prior to issuance of a final ruling on appeal. *Unarco Bloomington Factory Workers vs. UNR et al*, 124 B.R. 268 (N.D.Ill. 1990).

On July 28, 1992, the bankruptcy court determined Workers' classification. *In re UNR Industries, Inc.*, 143 B.R. 506 (Bkrtcy.

N.D.Ill. 1992). Based on the bankruptcy court's findings on remand, the district court dismissed Workers' confirmation appeal for lack of standing. Judgment of dismissal was entered on December 23, 1992 and docketed December 29, 1992. Also, on April 19, 1993, the district court dismissed Workers' appeal from the Amended UNR Asbestos Disease Trust as moot.

2. Court of Appeals Jurisdiction

The judgment entered on December 29, 1992 was a final order dismissing Workers' appeal on grounds including mootness and standing. By order of the district court, Workers were given to and including February 26, 1993 to file their appeal to the Court of Appeals, which was filed on February 26, 1993. That appeal was assigned 93-1510. Workers also appealed the April 19, 1993 judgment dismissing the Trust appeal on May 18, 1993. That appeal was assigned 93-2268. On May 28, 1993, the Court of Appeals entered an order consolidating 93-1510 and 93-2268 for purposes of briefing and disposition. The Court of Appeals had jurisdiction to review the district court's judgment dismissing Workers' appeals pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291, as the appeals were from final judgments regarding federal questions of bankruptcy law.

C. Facts

The principal reason for UNR's bankruptcy was the increasing exposure to asbestos product liability suits filed against the company. *In re UNR Industries*, 143 B.R. 506, 518-519 (Bkrtcy. N.D.Ill. 1992). Shortly after its bankruptcy filing, on October 12, 1982, UNR initiated a campaign to include, bind and discharge "Unknown Putative Asbestos-Related Claimants" in its bankruptcy proceeding by filing a motion to appoint a legal representative for them. *Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1113 (7th Cir. 1984). Withdrawing the reference from the bankruptcy court, the district court denied UNR's application on the basis that unknown future asbestos claimants did not hold

"claims" as defined in § 101(5) of the Bankruptcy Code and were not entitled to protection. *In re UNR Industries, Inc.*, 29 B.R. 741 (N.D. Ill. 1983), Workers' App. at H. UNR appealed that ruling, which was dismissed for lack of finality. *In re UNR Industries, Inc.* 725 F.2d 1111 (7th Cir. 1984), Workers' App. at D.

However, in dicta, the Court of Appeals suggested that regardless of whether future claims could ultimately be provided for in UNR's bankruptcy, the district court might reconsider an appointment of a legal representative to advocate their interests if one or more future claimants came forward and filed a claim. *Id.* at 1120. Although no future claimant came forward and requested the appointment of a legal representative, UNR renewed its request to the district court, who referred the matter to the bankruptcy court. *In re UNR Industries, Inc*, 46 B.R. 671, 673 (Bkrtcy. 1985), Workers' App. at I. UNR's Creditors' Committee also renewed their objection to the appointment, arguing that future tort victims could not be creditors of UNR's estate, and that the court should exercise judicial restraint and leave the problem of mass toxic tort disasters to the legislature. *Id.* at 674, 675. Without specifically deciding whether future claimants were creditors of UNR's estate, entitled to share in its assets, or the extent of its judicial power to include or bind such claimants, the bankruptcy court nevertheless decided that future tort victims were at least parties in interest, and entitled to be heard. Accordingly, a legal representative was appointed for them in February 1985. *Id.* at 676.

The appointment of the legal representative boosted UNR's campaign to discharge unknown, and unaccrued hypothetical claims of future victims of asbestos in its current bankruptcy. Under its Plan of reorganization confirmed in 1989, UNR's trade creditors and stockholders received approximately 37% of the reorganized debtor's ("New UNR") stock for claims held prior to UNR's bankruptcy. Prepetition UNR stockholders retained about eight percent of the debtor plus received warrants to pur-

chase more shares at a price fixed slightly higher than the market for the stock prior to confirmation of UNR's Plan. *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 271 (N.D.Ill. 1990). Most victims of asbestos disease were placed into "Class 5" of claims under the Plan. The Plan's definition of this class includes asbestos victims who may have been exposed to UNR's asbestos products before the bankruptcy, before confirmation, *or after confirmation*, but do not know they have an injury or do not yet even have an injury ("Future Claimants"). *Id*. Under the Plan, Class 5 asbestos creditors did not receive stock directly from New UNR. Instead, 63% of the shares of New UNR was distributed to an Asbestos Disease Trust, which was established to pay a portion of existing and Future Claims from asbestos related injuries. *Matter of UNR Industries, Inc.*, 20 F.3d at 788. As an essential condition to the Plan, the bankruptcy court also entered an Injunction which purported to bind Future Claimants by enjoining them from suing New UNR, and limiting satisfaction of their claims to the Trust. *See*, Order of Injunction entered in June of 1989, Workers' App. at K.

Workers objected to UNR's Plan, the Injunction and the Trust. Principally, Workers argued that the bankruptcy court did not have the power under Article III of the Constitution to enjoin Future Claimants or otherwise bind these unknown, hypothetical individuals to UNR's Plan. Moreover, even if the bankruptcy court had such jurisdiction, the Plan could not be confirmed under 11 U.S.C. § 1129(a)(7)(A)(ii), because the inclusion of Future Claims would dilute Workers' share of UNR's assets, and provide Workers less in UNR's Chapter 11 than in Chapter 7, where only existing claims would be paid by a Trustee. Finding that Future Claimants are ". . . claimants within the meaning of the Bankruptcy Code . . ." and that Article III jurisdiction existed by virtue of § 105[1] of the Bankruptcy Code, the bankruptcy court

[1]U.S.C. § 105(a) states in relevant part: The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

orally overruled Workers' objections. Transcript of Confirmation Proceedings, June 1, 1989, pp. 127-128, Workers' App. at L.

Workers appealed the Plan, Trust and Injunction Orders. Workers sought a stay pending these appeals ". . . at every opportunity . . .", including pressing emergency appeals from the bankruptcy court's denial of a stay to the district court and the Court of Appeals. 20 F.3d at 768-769. The primary reason for denying Workers their stay was that shortly after confirmation of its Plan, UNR issued stock warrants to its prepetition shareholders and the warrants began trading on a public exchange. The district court was concerned about stock trades done in reliance of the approval of UNR's Plan. *See*, excerpts from Transcript of Proceedings on Workers' motion for stay pending appeals, July 11, 1989, Workers' App. at M.

After Workers appealed these orders to the district court, the Trust Order was amended by the bankruptcy court, upon motion of the Trustees, in March of 1990. Workers objected to the amendment arguing *inter alia* that such an attempt to amend the Trust nearly a year after confirmation of the Plan violated 11 U.S.C. § 1127(b), which dramatically restricts modifications of Plans following confirmation and consummation. The bankruptcy court rejected Workers' objections, holding that the Trust was not part of UNR's Plan. Workers appealed that order to the district court which was then consolidated with the Workers' two appeals relating to the Plan and Injunction. *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 272 (D.C.Ill. 1990), Workers' App. at G.

The district court, again preoccupied with the trading of shareholder warrants and stock of New UNR in reliance on the Plan, dismissed most of Workers' Plan appeal as moot. *Id* at 281. Concluding that Workers' Article III "case or controversy" objection related to the Plan as opposed to the Injunction, the district court did not decide the issue because the Plan appeal was moot and Workers lacked standing to raise the jurisdictional issue. *Id*. at

273-274. As to most of Workers' remaining appeals, the court raised *sua sponte* the issue of whether Workers had standing to appeal the Plan and Trust, because Workers maintained they held Workmen's Compensation Claims, which, under the Plan, were entitled to full payment. UNR denied Workers were entitled to full payment, but the issue was not yet resolved by the bankruptcy court. The district court, on its own, and not at the request of Workers, as suggested in the Court of Appeals' decision (20 F.3d at 768), remanded the rest of Workers' appeals to determine classification of Workers' claims. The district court indicated that if Workers held Class 2 workmen's compensation claims, they might not possess standing to appeal the Plan or Trust, because the Plan promised to pay workmen's compensation claims in full. 268 B.R. at 282-283.

The bankruptcy court did not issue a decision on classification until over a year and a half following the remand. The bankruptcy court held that Workers possessed *both* Class 2 workmen's compensation claims and Class 5 asbestos claims. *In re UNR Industries, Inc.*, 143 B.R. 506 (Bkrtcy.N.D.Ill. 1992). UNR then moved to dismiss Workers' appeals before the district court on grounds of standing, raising the district court's previous *sua sponte* observation that full payment of the workmen's compensation claims eliminated any injury to Workers from implementation of the Plan or Trust. Over Workers' objections,[2] the district court dismissed Workers' remaining appeal of UNR's Plan for lack of standing. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, No. 89 C 5220 (N.D. Ill. Dec. 10, 1992), Work-

[2]Workers' Class 2 workers' compensation claims were subject to statutory caps and other limitations which did not exist in connection with Workers' Class 5 asbestos disease claims. Consequently, full payment of a workers' compensation claim would not necessarily be full payment of the Class 5 claim, which was an ordinary tort claim, not subject to limits imposed by the workers' compensation laws. Workers argued that the bankruptcy court's determination that they held Class 5 claims, in addition to Class 2, preserved their standing to appeal treatment of Class 5 claimants under UNR's Plan.

ers' App. at N. Additionally, reversing its previous decision in 1990 that the Workers' Trust appeal was not moot, the district court decided that the passage of time and Workers' failure to repeat requests for a stay of the Trust, after already having been denied a stay, mooted Workers' Trust appeal. *Unarco Bloomington Factory Workers v. UNR Industries, Inc. et al*, 165 B.R. 198 (D.C.Ill. 1993), Workers' App. at F.

Workers then appealed the district court's decisions on the Plan, Injunction, and Trust to the Seventh Circuit Court of Appeals. The appeals were consolidated for briefing purposes. On April 5, 1994, Judge Easterbrook issued the opinion for the court, disagreeing with the district court that Workers' appeals were moot, since the relief sought, i.e., excluding Future Claimants from trust assets, could still be granted. *Matter of: UNR Industries, Inc., et al*, 20 F.3d 766, 768,771 (7th Cir. 1994), Workers' App. at C. However, because of the Court's belief that activated plans should assume virtually a "holder in due course" status, subject to review for a "powerful reason" only, it declined to review the merits of Workers' three appeals. The Court of Appeals did not consider the question of the bankruptcy court's power to bind Future Claimants sufficiently important or novel to trigger review. *Id*. at 770-771.

IX. REASONS IN SUPPORT OF ALLOWING THE WRIT OF CERTIORARI

The Seventh Circuit's abstention decision was based on its view that while Workers' appeals were *not* moot, a "powerful reason" must exist to invoke review of a Chapter 11 plan once it is activated. Congress did not legislate any such limitation to the right to appeal from confirmation of a bankruptcy plan, although it

expressly limited the right to appeal other types of bankruptcy transactions,[3] and thus could have done so if considered wise. The Seventh Circuit's judicially created barrier to Congress' intent to afford an appeal, on unarticulated "prudential" grounds, violates the separation of powers mandated in the United States Constitution, both because the Seventh Circuit has legislated a new provision to the Bankruptcy Code, and because it refused to exert its jurisdiction, despite an "unflagging" obligation to do so. *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 358-359 (1989).

Conversely, the Seventh Circuit's endorsement of a bankruptcy court's power to enjoin unidentified, unknown future tort claimants, and bind them to a Plan negotiated with existing creditors, exceeds the bounds of jurisdiction granted under Article III of the United States Constitution. *Los Angeles v. Lyons*, 461 U.S. 95, 101-104, 111 (1983); *Whitmore v. Arkansas*, 495 U.S. 149, 157-159 (1990).

This simultaneous extension of jurisdiction beyond that clearly indicated in the Constitution, coupled with the failure to exercise the court's established power to hear Workers' appeals, turns the law of judicial restraint inside out. The result of UNR's attempts to deal with threatened future harm should have been the opposite of what the Seventh Circuit approved in this case. UNR's effort to dispose of future injuries was not a matter for the courts, but for the legislature. On the other hand, Workers' appeals relating to the proper construction of the bankruptcy laws was a matter for the court. And despite the difficult questions raised in those appeals, the Seventh Circuit's job was to decide them—not duck them.

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[3] 11 U.S.C. § 363(m) provides that failure to obtain a stay of an order approving the sale of assets, authorized pursuant to § 363, moots an appeal of the sale order after the sale closes.

A. The Seventh Circuit's Refusal To Consider Workers' Appeals Violates Separation of Powers Principles

1. Abstention From Workers' Appeals On The Basis That Reorganization Plans Should Not Be Disturbed Absent a "Powerful Reason" Substitutes the Court's Judgment for Congress'

Workers' principal objection to UNR's reorganization Plan was that the inclusion of Future Claimants in the Asbestos Disease Trust diluted the amount existing asbestos disease creditors, like Workers, would receive. Under this scenario, Workers would be better off if UNR were sold or liquidated in a Chapter 7 instead of reorganized under its Chapter 11 plan, since assets in the Chapter 7 would be distributed to creditors with allowed claims only. Because Future Claims are included to dilute Workers' share, UNR's Plan flunks the "best interests" test in 11 U.S.C. § 1129(a)(7)(A)(ii).[4] Workers sought the exclusion of Future Claimants from UNR's reorganization on the basis that the bankruptcy court had no power to adjudicate or bind them, and even if the power did exist under Article III of the Constitution, their hypothetical and necessarily estimated claims could not be in-

[4]Under UNR's Plan only asbestos disease creditors have had their claims significantly diluted by the inclusion of future asbestos disease claims. The Asbestos Disease Trust is required to limit current payouts to account for all future claims which may ever be made. At present, the Trustees have decided that this permits a payout of only 17 cents on the dollar to existing asbestos creditors, in installments. In contrast, neither UNR's trade creditors or shareholders' claims were significantly diluted. They received stock immediately and directly, and their payouts were not deferred until the Trustees figured out how to estimate the number of future claims. As counsel for UNR noted during oral argument before the Court of Appeals, given the dividends that were issued following UNR's confirmation, the trade creditors and old stockholders of UNR ultimately received nearly 100 cents of their claims against UNR. This tragedy of quickly cashing out those who voluntarily profited from UNR's business at 100 cents, versus the 17 cents for those tort victims involuntarily injured by UNR's enterprises, hardly is the "notable success" that Judge Easterbrook believes. 20 F.3d at 768.

cluded because of the Bankruptcy Code's definition of "claim" in 11 U.S.C. § 101(5).

Although Workers sought a stay pending their appeals at "every opportunity"[5], the stays were denied. Despite knowledge of Workers' appeals, UNR raced to implement its Plan and the Asbestos Disease Trust was established. The district court's decision to remand Workers' appeals to resolve a questionable issue of standing, raised *sua sponte*, delayed Workers' appeals for nearly two years. *See*, p. 6, herein. Nevertheless, the Seventh Circuit disagreed with the district court that Workers' appeals were moot. 20 F.3d at 771, 768. It decided that relief could be granted by holding that Future Claimants could not share in the Trust's assets. *Id.* at 768. However, even though the court admitted it had jurisdiction to review the appeals and grant Workers' relief, it abstained for "prudential" reasons:

> There is a big difference between the *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ("equitable mootness"). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the (local) lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan or reorganization at this late date.
>
> Far stronger is the contention that reliance on the plan of reorganization makes it imprudent to revise things. Since the Plan went into effect, more than 15 million shares of New UNR have been distributed to its creditors and pre-petition shareholders and are trading on public exchanges. Warrants for additional stock have been issued and are trading.
>
> *Id.* at 768-769.
>
> Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent

[5]20 F.3d 766, 769 (7th Cir. 1994).

> events . . . Many common law doctrines, such as the rule that a holder in due course takes free of certain defects in its predecessor's rights, reflect the importance of this effect. We do likewise in preserving plans of reorganization unless a powerful reason demands alteration.
>
> *Id.* at 770.

While there is precedent justifying judicial restraint for "prudential" as opposed to constitutional and jurisdictional reasons, the Seventh Circuit's abstention is not out of concern for effective presentation of issues, concreteness, adversity, conservation of court resources or other historically approved "prudential" reasons.[6] Instead, the Seventh Circuit's abstention results from its own belief that activated plans of publicly held companies should enjoy a presumption against appellate review. While Congress could conceivably decide that the interests of speculators in an insolvent company's stock are paramount to those who suffer injury as a result of the company's enterprise, it is inconceivable that an unelected judiciary could make this decision.

Indeed, the very justification argued for some "prudential" discretion to decline review is rooted in the Constitution's separation of powers principle, i.e., courts should shun issues that the legislature is better equipped to resolve. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984), quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (1983) (Bork, J., concurring):

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

See, also *Poe v. Ullman*, 367 U.S. 497, 503 (1961); Bickel, Alexander M., "The Least Dangerous Branch," 2d ed., Yale Univer-

[6]Waton, Corey C., Comment, "Mootness and the Constitution", 86 NW U.L. Rev. 143, 160, n. 138 (1991).

sity Press, (1986) at 70; Shapiro, David L., "Jurisdiction and Discretion", 60 N.Y.U.L. Rev. 543, 574 (1985). But in this case, the Seventh Circuit used abstention to make legislative policy, instead of avoiding it. Abstention used in this fashion threatens the balance of power between the courts and the legislature:

> Judge-made abstention constitutes judicial lawmaking of the most sweeping nature. Although a federal court's decision to infer a private cause of action may arguably invade the legislative process, judge-made abstention presents a considerably greater risk of judicial usurpation. While judicial creation of private rights of action can undermine a carefully structured statutory goal only indirectly, judicial lawmaking through abstention can very directly undermine that goal.
>
> Recognition that abstention amounts to judicial lawmaking shifts the focus of the abstention debate away from the comparative merits of the policies for and against the various forms of abstention and toward the issue of the institutional legitimacy of such action on the part of the judiciary. Well accepted principles of separation of powers mandate that an electorally accountable legislature make the basic policy decisions concerning how the nation is to be governed. The authority to make these policy decisions necessarily includes the authority to employ the federal judiciary to enforce the substantive statutory programs adopted by Congress. Absent a finding of unconstitutionality, it is not the judiciary's function to modify or repeal a congressional enforcement network unless Congress has clearly delegated such authority to the judiciary. No court or commentator has presented persuasive evidence of any congressional intent to delegate such authority. Indeed, throughout the nation's history, Congress has retained for itself the authority to decide when federal courts should decline to exercise their jurisdiction.
>
> Redish, Martin H., "Abstention, Separation of Powers, and the Limits of the Judicial Function", 94 Yale Law Journal 71, 114-155 (1984).

Workers possessed a right to appeal:

> Final orders are appealable as of right. 28 U.S.C.A. § 158(a) gives district courts jurisdiction of final orders,

> decisions etc. of the bankruptcy court and § 158(b) gives the bankruptcy appellate panels jurisdiction of such bankruptcy court orders. Courts of appeal for the circuits are given jurisdiction of final orders entered under those provisions.
>
> *Cowans Bankruptcy Law and Practice*, Vol. 3, § 18.2(i), p. 487 (1994). *See* also, 28 U.S.C. § 158(d).

Orders confirming plans and entering injunctions under § 105 of the Bankruptcy Code are final. *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990); *Cowans Bankruptcy Claw and Practice*, Vol. 3, § 18.2(d), p. 475 (1994).

Congress placed no special limitation or test, such as the Seventh Circuit's "powerful reason" rule, on a creditor's right to appeal a reorganization in bankruptcy. In contrast, Congress did state in § 363(m) of the Bankruptcy Code, that a failure to obtain a stay of an order authorizing the sale or lease of an asset, *pursuant to § 363*, cannot affect the validity of the sale or lease unless a stay pending appeal was obtained. It is significant that the wording of § 363(m) expressly refers to sales under § 363 only, and there is no companion provision in § 1129 relating to confirmation of plans.

There is good reason for this. Sales or leases of an estate's assets do not have the vast potential for altering the rights of creditors as reorganization plans do. Indeed, if UNR's reorganization remains intact, § 1129 is "all powerful" and can even affect the rights of "Future Claimants" who do not yet have or realize they have a claim against UNR. As to § 363, Congress may have balanced the need for producing clear title with respect to the sale of an estate's asset against the rights of creditors, and determined that good title was paramount, absent a stay pending appeal. In contrast, the certainty regarding the value of a reorganized company's stock may not be paramount to the rights of creditors discharged pursuant to §§ 1129 and 524 of the Bankruptcy Code,

and Congress' failure to limit appeals from reorganizations, as opposed to asset sales or leases, was likely a deliberate act.

Nevertheless, the Seventh Circuit has determined that the policy behind § 363(m) should be transplanted to 1129, to enhance the value of the reorganized company's assets. 20 F.3d at 769-770. Its holding that it will refuse to adjudicate appeals from implemented plans, absent a "powerful reason", has no support in the Bankruptcy Code, or in the cases cited by the Seventh Circuit for the proposition that ". . . a plan of reorganization, once implemented, should be disturbed only for compelling reasons . . ." *Id.* at 769. All of the cases cited in support of that proposition deal strictly with the ability to grant relief to the appellant and whether or not the appeal is moot in an "Article III" sense. *Id.* In contrast to those cases, the Seventh Circuit has held that Workers' appeals are not moot, because relief can be granted. However, absent some "powerful reason", the issues of bankruptcy law raised by Workers are just "details", not deserving of review.[7] *Id.* at 771. The Seventh Circuit's "powerful reason" requirement is rank, judicial legislation that upsets the separation of powers mandated in our Constitution and should be reversed by this Court. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981).

2. The Court Had A Duty To Decide Workers' Appeals Once It Determined It Could Provide The Relief Requested

Given a reorganization plan's ability to drastically cut off rights of creditors, the courts of appeals have a duty to consider the merits of a creditor's appeal, absent a limitation expressly placed in the Bankruptcy Code, or mandated under Article III of the

[7]The Seventh Circuit's opinion does not even discuss Workers' Injunction and Trust appeals. It is impossible to reconcile this with UNR's assertion in response to Workers' Petition for Rehearing that the Seventh Circuit really decided the appeals in contrast to abstention.

Constitution. As Justice Scalia recently expressed in *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350 (1989) at 358-359:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within constitutionally permissible bounds. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922) . . . We have carefully defined, however, the areas in which such "abstention" is permissible, and it remains " 'the exception, not the rule.' " *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). As recently as last Term we described the federal courts' obligation to adjudicate claims within their jurisdiction as " 'virtually unflagging.' " *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

See also, *England v. Medical Examiners*, 375 U.S. 411 (1963) at 415: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . ." (Quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40.) Even ardent advocates of this Court's power to use discretion to decline jurisdiction recognize the obligation and duty of lower federal courts to accept it. *Wyoming v. Oklahoma*, 117 L. Ed. 2d 1, 36 (1992) (Thomas, J., dissenting, noting that lower federal courts are available to consider issues the Supreme Court declines); *See*, Bickel, Alexander M., "The Least Dangerous Branch", 2d ed., Yale University Press, (1986) at 173: "They must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos."

Moreover, one commentator, who does champion broad discretion to abstain for the lower courts, at least recognizes that discretion must be rooted in a historical or common law tradition. Shapiro, David L., "Jurisdiction and Discretion", 60 N.Y.U.L.

Rev. 543, 575 (1985). Otherwise, "A judicial power limited only by a judge's imagination is too offensive to the constitutional principles of limited power, separated powers, and even federalism to merit further consideration." Waton, Corey C., Comment, "Mootness and the Constitution" 86 NW U.L. Rev. 143, 166, n.166 (1991).

If this Court permits the Seventh Circuit to function as a "mini Supreme Court", effectively reviewing only those questions of law it chooses, more lower courts may employ similar discretion as an "escape hatch" from difficult questions.[8] Congress should make the rules and the federal courts should construe them. Here the Seventh Circuit abdicates its responsibility to decide Workers' appeals, and exceeds its authority in erecting judicially legislated barriers to those appeals.

B. The Inclusion of "Future Claimants" In UNR's Reorganization Exceeds The Judicial Power Granted In Article III of the Constitution and the Bankruptcy Code

1. Workers, As Existing Creditors Whose Shares Will Be Diluted By Including Future Claimants, Have Standing To Contest Their Inclusion

The bankruptcy court found that without the Injunction against Future Claimants, as well as existing creditors, UNR could not conduct its business or reorganize under Chapter 11.

[8]Field, Martha A. "The Uncertain Nature of Federal Jurisdiction", 22 William and Mary Law Review 683 (1981) at 724:

> . . . the flexibility the jurisdictional rules provide in their undeveloped state can prove useful to judges, allowing them to dispose of difficult cases without having directly to discuss the moral, social or political value judgments behind those dispositions. Some of the results judges have reached by following this approach seem, however, singularly inappropriate. For example, many of our discretionary doctrines allowing nonexercise of jurisdiction in cases falling within congressional grants apply primarily, or even exclusively, in civil liberties cases. . . .
>
> Perhaps one reason these rules have nonetheless developed here is that many difficult cases are involved, so it is an area in which courts look for escape devices.

Injunction Order, June 1, 1989, ¶ 5 Workers' App. at K-3. Significantly, the bankruptcy court determined that "Absent a successful reorganization, Debtors' assets would be liquidated and distributed only to *existing creditors* pursuant to Chapter 7 of the Bankruptcy Code." *Id.*, ¶ 7, (emphasis added). Based on the bankruptcy court's findings in the Injunction Order, the issue of whether Workers must share assets with Future Claimants hinges directly on the entry of the Injunction. Absent the Injunction barring Future Claimant lawsuits, Workers do not have to share assets with Future Creditors.

Both *Hanson v. Denckla*, 357 U.S. 235, 245 (1958) and *Phillips Petroleum Co. v. Shutts et al*, 472 U.S. 797, 805-806 (1985) held that one party has standing to assert lack of jurisdiction over another party who is necessary for the resolution of the lawsuit. UNR maintains that the inclusion of Future Claimants in the Injunction is necessary to its reorganization. Inclusion reduces Workers' share of recovery from UNR. Workers may accordingly raise the issue of whether the bankruptcy court has jurisdiction of Future Claimants under both Article III of the Constitution and the Bankruptcy Code.

The courts are also independently obligated to examine their jurisdiction to bind Future Claimants. *Minority Pol. Off. Ass'n v. City of South Bend, Ind.*, 721 F.2d 197 (7th Cir. 1983) at 199: ". . . a federal court does not acquire subject matter jurisdiction by the consent of the parties . . . we have an independent obligation to police the constitutional and statutory limitations on our jurisdiction . . ." See also, *American Motorists Insurance Company v. United Furnace Co.*, 876 F.2d 293 (2d Cir. 1989) at 298: "We must remain alert at all times to questions of subject matter jurisdiction, with or without prompting by the parties."

2. Under Article III Of The Constitution, There Is No Jurisdiction To Bind Future Claimants

In discussing the "case and controversy" requirement of Article III of the Constitution, this Court observed: "Federal Courts

must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106 (1976) at 113.

In responding to Workers' point that there is no "case or controversy" jurisdiction to include Future Claimants within a reorganization, the Seventh Circuit stated that ". . . even if no one has yet been injured and the risk to any particular plaintiff is slight . . ." there is a case or controversy. 20 F.3d at 770. However, *Duke Power Co. V. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) did not so hold. In *Duke*, a bare majority of this Court held that residents near a nuclear power plant had standing to challenge a statute's limitation on compensation for nuclear accidents, because the lower court determined that some environmental damage had already occurred, and not because there was a slight probability that a full blown melt down would happen in the future. 438 U.S. at 73-74; 82; 94-95. The *Duke* decision emphasized there is no "case or controversy" to affect the rights of persons not before the court, and actually supports Workers' position that there is no jurisdiction to include Future Claimants in UNR's bankruptcy. *Id.* at 80-81. *See*, also the concurrence of Justice Rehnquist at 101: "Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against the defendant."

UNR insists that without the inclusion of third parties not before the court, i.e., Future Claimants, it cannot be given the relief it sought in bankruptcy—to be rid of their claims. Nevertheless, no matter how desirable for courts to engage in management of mass torts, there is no jurisdiction to do so. As Justice Stevens stated in his concurring opinion in *Duke*:

> We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual

> case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.
>
> *Id.* at 103.

Moreover, *Duke Power* is considered an atypical decision, given this Court's familiar rules of ripeness, standing, and concrete injury, and was probably motivated by the Court's desire to reverse the lower court ruling that the nuclear accident statute was unconstitutional. *See*, Floyd, C. Douglas, "The Justiciability Decisions of the Burger Court", 60 Notre Dame Law Review 862, 901 (1985) and Page 927:

> The Court's approach in *Duke Power* was fundamentally in error. The only immediate injury was unrelated to any arguable claim of right by the plaintiffs. And their only arguable claim of right—application of the limitation of liability provision—was not ripe. The Court was motivated by its perception of the public interest in prompt resolution of the constitutionality of the limitation of liability provision. But a principled separation of powers view of justiciability would, at the very least, have required congressional recognition of the appropriateness of judicial review in order to proceed, such as that in *Buckley*. . . . The approach in *Duke Power* should therefore be rejected in favor of that reflected in *Buckley v. Valeo*.

Significantly, two of this Court's decisions following *Duke Power*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), both strongly reaffirm that future injuries are not concrete enough to support judicial intervention under Article III of the Constitution. In *Lyons*, plaintiff's actual injury from a "chokehold" by a police officer, and his allegations that (1) chokeholds were encouraged by the Los Angeles Police Department in routine arrests, (2) the chokeholds caused ten deaths, and (3), five more deaths had occurred since the filing of his complaint, did not support jurisdiction to enter an injunction compelling the police department to halt the policy.

Actual injury, coupled with the anticipation that more would result, was not sufficient under Article III of the Constitution. 461 U.S. at 101-103.

In *Whitmore,* a fellow prison mate argued that he should be allowed to appeal the conviction of Simmons, who had waived his right of appeal. Whitmore alleged injury to himself, as well as asserting "next friend" status regarding Simmons. This Court held that Article III standing requires a concrete, non-speculative injury. *Lyons* was reaffirmed by this Court. 495 U.S. at 158. Moreover, Whitmore's attempt to become a "next friend" or legal representative of Simmons still did not afford standing. For a representative to litigate the interests of another, that "friend" must have some "significant relationship with the real party in interest." *Id.* at 163-165. In this case, the Future Claimant's legal representative, Kevin Forde, had no connection; he was simply an attorney appointed by the United States Trustee's Office, whose charge was to divine the interests of these unidentified people. Under *Whitmore*, Mr. Forde had no standing to negotiate for or bind the Future Claimants to UNR's Plan, and the courts had no power to enter orders reflecting his decisions on their behalf.

The bankruptcy court's appointment of a "legal representative" for claims which do not yet exist against UNR did not create a case or controversy. A party must seek relief for himself and the court must have the potential to redress the injury. *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Diamond v. Charles*, 476 U.S. 54 (1986), a doctor was not allowed to represent the rights of an unborn fetus. In that case, certain provisions of an Illinois statute restricting abortion were held unenforceable. The State of Illinois did not appeal these rulings, so Diamond, a physician opposed to abortion, intervened to challenge the decisions in order to protect the rights of unborn fetuses. This Court denied intervention since no case or controversy existed. 476 U.S. at 61-62; 67. Under *Diamond*, a legal representative for nonexistent

claimants cannot eliminate the case or controversy requirement of the Constitution. Although the likelihood of an unborn child asserting its own rights is much less than a potential asbestos victim, this Court recognized the importance of enforcing the case or controversy doctrine.

The minimum constitutional mandate under Article III is that a party may only invoke federal jurisdiction when he has himself suffered a threatened or actual injury resulting from another's illegal act. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Additionally, representatives cannot assert the rights of others unless the damages claims are "common to the entire membership" and shared by all in "equal degree." 422 U.S. at 515. As the literature reflects, contact with asbestos can produce a variety of illnesses, some slight, some deadly. Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia*, 188 J.A.M.A. 22 (1964); Seidman, Selikoff & Hammond, "Short-term Asbestos Work Exposure and Long-term Observation," *Health Hazard of Asbestos Exposure*, 330 Annals N.Y. Acad. Sci. 31 (1979).

The whole purpose of demanding a concrete injury is to make certain that judicial effort is not wasted on a hypothetical situation that may not even bind the individual who later becomes injured. Brilmayer, Lea, "The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement", 93 Harvard Law Rev. 297, No. 2 (1979). Professor Brilmayer observed: "The justiciability requirements serve as procedural safeguards for the important liberal value of self-determination. Persons should not be able to assert the rights of others, even assuming they are good representatives, that is, likely to prevail on the merits. Standing to sue with its injury in fact requirement serves this protection." She cited *Gilmore v. Utah* 429 US 1012 (1976), in support of her point. There this Court denied Gary Gilmore's mother standing to fight the execution of her son, who wanted to die. *Schuppin v. Unification Church* 435 F. Supp 603 (D. Vt.), *aff'd* 573 F2d 1295 (2d Cir. 1977) was another example of people

attempting to assert the rights of others, contrary to the wishes of the real party in interest. In that case, the court of appeals denied standing to parents who wanted their daughter removed from the Moonies. She did not want to leave. Professor Brilmayer concluded at p. 314:

> These are unusual cases, and not just because of the unusual preferences of the third parties involved. They are also unusual because it is rare, in cases where standing is denied, to have such complete information about the preferences of the person who would purportedly benefit...To abandon the case or controversy doctrines would be, in effect, to say that it is not important to find out who is personally affected and what their wishes are.

Similarly, in denying UNR's initial request for appointment of a legal representative, the district court observed that a "Peter John Robinson" desired to intervene, alleging that while he was exposed to asbestos, he had not contracted any disease, but might do so in the future. He opposed the appointment of the legal representative. *In Re UNR Industries, Inc.*, 29 B.R. 741, 743, n.1 (D.C. 1983). Thus, contrary to what the Seventh Circuit may believe, some Future Claimants might well prefer to take their chances and sue New UNR, or its insurers, instead of submitting their claims to a Trust.

The Seventh Circuit dismisses the jurisdictional issue by concluding that UNR's Plan ". . . was negotiated and approved by the undisputed, current creditors." 20 F.3d at 770. But this begs the question. How is it possible for existing creditors to use the courts to determine the rights of third parties not before the court? The fact that it was negotiated by existing creditors is precisely the point. Neither UNR nor its creditors had any standing to affect the rights of these unidentified potential claimants.

Judge Easterbrook speculates that the significant cost of insuring UNR against future asbestos claims means the injuries are imminent and concrete. *Id.* Certainly the insurability of a risk,

and the cost of the premium, are not synonymous with the courts' power to adjudicate under Article III.

None of the other cases cited in the Seventh Circuit's opinion are even marginally relevant to whether a "case or controversy", and thus jurisdiction, exists to include Future Claims in UNR's reorganization. *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562 (7th Cir. 1986) and *In re Iowa R.R.*, 840 F.2d 535 (7th Cir. 1988) both hold that a creditor cannot set off its post bankruptcy obligation for railroad interline balances against a prebankruptcy debt for interline balances owed by the debtor. If anything, these cases support Workers. In *Boston*, the court of appeals stated:

> A corporate reorganization is fundamentally a process of dividing assets among the firm's creditors on the day of bankruptcy...bankruptcy draws a line between the existing claims to a firm's assets and newly-arising claims. Existing claims are divided according to the contractual rights of the claimants.[citation omitted]. If there are not enough assets to go around, some claims may be written down or extinguished. The ongoing operations of the business are treated entirely differently; *new claims are paid in full as they arise.* 785 F.2d 565 (Emphasis added).

Boston and the other cases cited in the Seventh Circuit's Opinion reflect a fundamental respect for the difference between a prepetition bankruptcy claim and a future claim.[9] As noted

[9]It often seems as if the Opinion ignores that the claims arising following UNR's bankruptcy will include true future claims, i.e., exposure and injury from an old UNR product that does not occur until after the Plan. And even though state law treats claims as arising at the time of injury, and thus opening the door to thousands of future claims to be pressed against UNR, the Opinion appears to improperly dismiss state law and determine for itself that any claim resulting from an older UNR asbestos product, no matter when the injury arises, causes that claim to arise prepetition. By apparently making this assumption, the panel sees no constitutional difficulty in dealing with the claims. However, state law does not hold that such claims arose before the bankruptcy and state law, as opposed to federal, defines the nature of a creditor's property interest in bankruptcy.

above, if an entity emerges from bankruptcy, it must pay the new claims which arise in full. These cases in no way support the method employed by UNR, which is to select certain types of new, or future claims, for inclusion in a limited pot to be divided with existing creditors.

While the treatises cited by the Seventh Circuit may argue that Future Claimants should be included in a reorganization[10] for policy purposes, they did not offer any solution to the Constitutional limits on the federal courts' power to grant UNR the relief it wants regarding Future Claimants. Similarly, the Seventh Circuit's opinion focuses entirely on policy as opposed to requirements of the law, which it terms "details". 20 F.3d at 771.

3. The Seventh Circuit's Holding That Future Claims May Be Included in the Bankruptcy Code's Definition of "Claim" Conflicts With Other Circuits

Aside from the Article III barrier, every court of appeals confronting the issue directly has disagreed with the Seventh Circuit's view that estimates of future tort injuries are "claims" as defined in the Bankruptcy Code. *See*, 11 U.S.C. § 101(5). The Seventh Circuit's holding conflicts with the Third and Fifth Circuit Court of Appeals, and dictum from the Second Circuit. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3rd. Cir.), *cert. denied sub nom.*, *Reading Co. v. Schweitzer*, 474 U.S. 864 (1985); *Remington Rand Corp.*, 836 F.2d 825, 832, note 7 at 833, (3rd Cir. 1988); *In re Mooney Aircraft*, 730 F.2d 367, 375 (5th Cir. 1984); *In re Chateaugay Corporation*, 944 F.2d 997 (2d Cir. 1991).

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[10]Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, pp. 47-54 (1986), (Jackson does not even mention or discuss whether the court would have jurisdiction under Article III; his book appears limited to justifying and advocating certain results on policy grounds.) Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846 (1984).

At about the same time the Seventh Circuit issued its opinion in this case, the Fifth Circuit reiterated its view that the future tort liability of a company is not a "claim" under the Bankruptcy Code when the victims are unidentified—as in this case. *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994). As a result, a clear conflict among the circuits exist which should be resolved. Even if this Court decides that the federal courts have the power to resolve mass torts in bankruptcy, individuals holding claims will span across state and circuit court lines. The meaning of claim in § 101(5) of the Bankruptcy Code, in the context of tort injuries, needs to be uniform among the circuits.

X. Conclusion

For the reasons stated herein, Workers request this Court to grant its Petition For A Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit.

Respectfully submitted,
UNARCO BLOOMINGTON
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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR., INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP.,
Debtors-In-Possession.

UNARCO BLOOMINGTON FACTORY WORKERS,
Petitioners,

v.

UNR INDUSTRIES, INC., et al.,
Debtors-Respondent,

and

TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,
Respondent.

Appendix to
Petition for a Writ of Certiorari to the
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APPENDIX A

In the Matter of: UNR INDUSTRIES, INC., et al., Debtors.
Appeals of: UNARCO BLOOMINGTON FACTORY WORKERS
In re UNR INDUSTRIES
Nos. 93-1510 and 93-2268

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1994 U.S. App. LEXIS 12519
May 27, 1994, Decided

Original Opinion of April 5, 1994, Reported at: 1994 U.S. App. LEXIS 6515. DISPOSITION: DENIED. JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. JOHN T. CURTIN, District Judge * * Hon. John T. Curtin, of the Western District of New York, sitting by designation.

OPINION: Order Unarco Bloomington Factory Workers filed a petition for rehearing and suggestion of rehearing en banc on April 19, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: April 5, 1994

BEFORE: Honorable John L. Coffey, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

Honorable John T. Curtin, District Judge*

Nos. 93-1510 and 93-2268

IN THE MATTER OF:
UNR INDUSTRIES, INCORPORATED, UNARCO INDUSTRIES, INCORPORATED, UNR INCORPORATED, et al.,

Debtors—Appellees

APPEALS OF: UNARCO BLOOMINGTON FACTORY WORKERS

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 89 C 5220 and 90 C 2180, Marvin E. Aspen, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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*The Honorable John T. Curtin, of the Western District of New York, is sitting by designation.

(1061-110393)

APPENDIX C

In the Matter of: UNR INDUSTRIES, INC., et al., Debtors.
Appeals of: UNARCO BLOOMINGTON FACTORY WORKERS

In re UNR INDUSTRIES

Nos. 93-1510, 93-2268

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

20 F.3d 766; 1994 U.S. App. LEXIS 6515
December 8, 1993, Argued April 5, 1994, Decided

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 82 B 9841 et al. Marvin E. Aspen, Judge.

JUDGES: Before COFFEY and EASTERBROOK, Circuit Judges, and CURTIN, District Judge. * * Hon. John T. Curtin, of the Western District of New York, sitting by designation.

EASTERBROOK, Circuit Judge. Twelve years ago, claims based on exposure to asbestos UNR Industries had manufactured or sold were rolling in, with no end in sight and a correspondingly slim chance of satisfying all current and future claims. UNR commenced a reorganization in bankruptcy, the first asbestos manufacturer to do so. After some preliminary maneuvering recounted at 725 F.2d 1111 (1984), and 736 F.2d 1136 (1984), the firm and its creditors agreed on a plan of reorganization. The reorganized firm ("New UNR") endowed an Asbestos Disease Trust, which received approximately 63 percent of the firm's stock to supply additional income. Other creditors received the bulk of the remaining stock in lieu of cash payment. Shareholders retained only 8 percent of the stock. Claims relating to asbestos—whether the disease was manifest or latent at the time of the reorganization—must be presented to the Trust. After confirmation of the plan, New UNR emerged from the reorganization

as a healthy business, free from enervating litigation. It has raised new capital, which would not have been possible without liberating its future endeavors from claims attributable to past wrongs. Some, albeit incomplete, compensation for asbestosis, mesothelioma, and related diseases is assured. UNR blazed a trail that other asbestos producers, such as Manville and Robbins, followed. When approving an award of attorneys' fees to the debtors' attorneys, we characterized the outcome as a "notable success". 986 F.2d 207, 208 (1993).

Not everyone agrees. One group of creditors declined to approve the plan and has carried on a rear guard action since its confirmation. Although the plan of reorganization ensures full payment of all workers' compensation awards, employees of UNR's plant in Bloomington, Illinois, believe that they are entitled to more. Their additional claims have been grouped with those of UNR's customers. Accordingly, the employees must apply to the Trust for payment of any claim in excess of workers' compensation. Requests for reclassification have gotten the employees nowhere—although the district court has not foreclosed all possibility of relief. See 1994 U.S. Dist. LEXIS 502 (N.D. Ill.) (postponing final decision until after the disposition of this appeal). What is at stake on this appeal is nothing less than the vitality of the plan of reorganization itself. The employees took a timely appeal from the bankruptcy court's order confirming the plan. Both the district court and this court denied motions to stay implementation of the plan. The employees' request for reclassification of their claims delayed the resolution in the district court of their objections to the plan itself. (So did orders holding James Walker, their lead counsel, in contempt of court for defying the injunction that directs the employees to present their claims to the Trust rather than to the reorganized UNR and related entities.) Eventually, however, the district court dismissed as moot all challenges to the confirmation of the plan. See 124 Bankr. 268 (N.D.Ill. 1990), 143 Bankr. 506 (N.D. Ill. 1992), 1993 U.S. Dist.

LEXIS 5111, 1994 U.S. App. LEXIS 6515, (N.D. Ill.). The long delay between the bankruptcy court's confirmation of the plan and the district court's disposition of objections to that action laid the foundation for the conclusion that the plan is beyond challenge.

UNR urges us to join the district court in sweeping all pieces off the board. Three years after the confirmation of the plan of reorganization is simply too late to upset the apple cart, it insists, making legal debate futile. (The plan was confirmed on June 1, 1989, and was implemented on March 2, 1990.) To the extent UNR and the district court believe that the case is moot in the sense that relief is impossible, so that there is no longer a case or controversy within the scope of Article III, they overstate matters. Even when it is no longer possible to restore the parties to the positions they used to occupy, the case remains live while "a court can fashion some form of meaningful relief". *Church of Scientology v. United States,* 121 L. Ed. 2d 313, 113 S. Ct. 447, 450 (1992) (emphasis in original). We could give the employees much of what they want by holding that persons whose disease was not manifest by the date the plan was confirmed may not obtain compensation from the Trust; the employees then would have fewer competitors for the limited assets. Whether we should do any such thing is a different matter. The raw ability to do it means that the case is not moot.

Far stronger is the contention that reliance on the plan of reorganization makes it imprudent to revise things. Since the plan went into effect, more than 15 million shares of New UNR have been distributed to its creditors and prepetition shareholders and are trading on public exchanges. Warrants for additional stock have been issued and are trading. (The Trust has received still more shares, but these have not been sold to outside investors.) Corporate acquisitions and divestitures (not to mention ordinary commercial transactions) have occurred; tax consequences (including a $90 million income tax benefit) have been realized;

large insurance settlements have been disbursed; lawsuits have been dismissed. Undoing all of this is impossible. Undoing part of it—the identification of persons entitled to make claims on the assets in the Trust—is possible but has ramifications for the rest of the plan. Reducing the claims to be made on the Trust would imply a reallocation of some stock to UNR's other creditors. If persons for whom the consequences of exposure to asbestos was not manifest as of 1990 cannot make claims against the Trust, can they press them against New UNR? If the answer is yes, then the allocation of insurance proceeds must be changed—and there will be a sudden revaluation of the shares of New UNR, which current holders purchased on the assumption that all asbestos payments would be borne by the Trust.

In common with other courts of appeals, we have recognized that a plan of reorganization, once implemented, should be disturbed only for compelling reasons. E.g., *In re Chateaugay Corp.*, 10 F.3d 944, 952-54 (2d Cir. 1993); *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047-49 (7th Cir. 1993); *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981); *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1554-55 (11th Cir. 1988); *In re AOV Industries, Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1147-50 (D.C. Cir. 1986). Several provisions of the Bankruptcy Code of 1978 provide that courts should keep their hands off consummated transactions. For example, 11 U.S.C. § 363(m) says that the reversal of an order authorizing the sale or lease of property of an estate "does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal". Unless the sale is stayed pending appeal, the transaction survives even if it should not have been authorized in the first place. See *In re Sax*, 796 F.2d 994 (7th Cir. 1986); cf. *In re Edwards*, 962 F.2d 641 (7th Cir. 1992) (concluding that § 363(m) does not, however, forbid all forms of collateral

attack). Another section of the Code, 11 U.S.C. § 1127(b), dramatically curtails the power of a bankruptcy court to modify a plan of reorganization after its confirmation and "substantial consummation". Section 1127(b), unlike § 363(m), does not place any limit on the power of the court of appeals, but the reasons underlying §§ 363(m) and 1127(b)—preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg—are so plain and so compelling that courts fill the interstices of the Code with the same approach. Sometimes the doctrine goes under the banner "equitable mootness," but the name is misleading. There is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ("equitable mootness"). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the (local) lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.

Our opinion in *Specialty Equipment* observes that failure to seek a stay pending appeal counsels against upsetting a plan of reorganization. 3 F.3d at 1047. UNR's employees sought a stay at every opportunity; by doing so, they insist, they preserved their entitlement to full appellate review. Perhaps so, if failure to seek a stay were a censurable event to be punished by refusal to adjudicate the merits. Yet requesting a stay is not a mandatory step comparable to filing a timely notice of appeal. The significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance on the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the

plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent events. Self-protection through the adjustment of prices may affect the viability of the reorganization, and in any event may distort the allocation of assets away from the persons who can make the most valuable uses of them and toward persons who are less sensitive to the costs of ex post changes of plans. By protecting the interests of persons who acquire assets in reliance on a plan of reorganization, a court increases the price the estate can realize ex ante, and thus produces benefits for creditors in the aggregate. Many common law doctrines, such as the rule that a holder in due course takes free of certain defects in its predecessor's rights, reflect the importance of this effect. We do likewise in preserving plans of reorganization unless a powerful reason demands alteration.

Have the employees demonstrated such a reason? They say that treating as "creditors" persons whose injuries from UNR's products are not yet manifest violates not only the Bankruptcy Code but also the Constitution. The constitutional claim is mysterious. Injuries attributable to past acts are certain to occur; although the identity of the victims remains to be ascertained, the existence of the injury is real enough. Insurers would charge a pretty penny to underwrite a policy covering these injuries; they would not assume that probabilities equate to nonexistence. Cases such as *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978), hold that persons at risk of injury may sue to block the source of the danger, even if no one has yet been injured and the risk to any particular plaintiff is slight. Application of this principle to voluntary creditors such as employees is clear enough. A firm that promised medical care, or retirement or death benefits, to its employees may be required to purchase an annuity to fund the promises, even though the beneficiaries cannot be known with precision at the time of the reorganization. Similarly, a dispute

about the enforceability of a policy of insurance is justiciable even though no casualty has occurred. See also *Lujan v. Defenders of Wildlife*, 119 L.Ed. 2d 351, 112 S. Ct. 2130, 2136 (1992). At all events, the structure of the plan does not depend on particular claims filed by potential victims; it was negotiated and approved by the undisputed, current creditors. The disposition of UNR's assets surely posed a case or controversy for the bankruptcy court to adjudicate. The plan of reorganization provides that future claims will be satisfied out of one pile of assets (the Trust) rather than another (New UNR); apportioning claims among assets is a traditional function of bankruptcy adjudication. Principles of tort law, and of corporate reorganizations, do the same, without protest on constitutional grounds. See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993) (discussing the circumstances under which buyers of assets are liable for their predecessors' torts).

As for the contention that the statute does not contemplate such a step: 11 U.S.C. § 101(5)(A) defines as a "claim" every "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured". The definition is capacious, to say the least. Attaching labels such as "contingent" and "unmatured" and "disputed" to the interests of persons who will become sick in the future because of exposure to UNR's asbestos therefore does not put those interests beyond the power of the bankruptcy court. The employees' observation that the plans reorganizing Manville and Robbins provided for payment of a higher percentage of current (and future) damages is altogether irrelevant to the definition of a "claim" under the Code and the propriety of the plan of reorganization.

Bankruptcy separates the past and future of an enterprise, satisfying claims attributable to yesterday's activities out of existing assets and thereby enabling business operations that have positive value to carry on, unburdened by the sunk costs of blunders that

are beyond recall. *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562 (7th Cir. 1986); *In re Iowa R.R.*, 840 F.2d 535 (7th Cir. 1988); *Stamp v. Insurance Co. of North America*, 908 F.2d 1375 (7th Cir. 1990). By letting bygones be bygone, from the firm's perspective, while assuring some compensation to those who learn in the future that these bygones caused them injury, a plan of reorganization like the one adopted here promotes both productivity and compensation. Failing to satisfy, out of assets available at the time of the petition, the claims of persons whose injury becomes manifest after the filing of the petition, would simultaneously provide (other) creditors with excessively large shares of the estate, and create a drag on ongoing operations that could cause the dissolution of business ventures with positive cash flow (and thus potentially substantial social and private value). See Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 47-54 (1986); Mark J. Roe, Bankruptcy and Mass Tort, 84 Colum. L. Rev. 846 (1984). Cf. Douglas G. Baird, The Elements of Bankruptcy 90-91 (rev. ed. 1993). We observed in an earlier appeal, 725 F.2d at 1118-19, that making provision for future claimants would pose formidable logistical problems, but these have been overcome. We were concerned that the effort might be "a quixotic undertaking far beyond the realistic boundaries of judicial competence". Id. at 1120. Things have turned out better than we feared in 1984. By 199[illegible]e could declare the outcome a "notable success". 986 F.2d at 208. So there is no absolute bar to the approach adopted in UNR's plan of reorganization. Whether one or another detail (for example, the allocation of insurance proceeds and the release of additional claims against insurers) could have been accomplished better is precisely the sort of question that should not upset a substantially consummated plan of reorganization. We do not express any view on the merits of the employees' challenge to these details, or even inquire whether these particular creditors are entitled to challenge them; three years after confirmation of the plan, it is enough that they are details. Thus although we do not share the district court's view that the case is moot, we approve its conclusion that the plan should not be disturbed. AFFIRMED

APPENDIX D

D-1

MATTER OF UNR INDUSTRIES, INC., et al.,
Debtors-Appellants

In re UNR INDUSTRIES

No. 83-1746

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

725 F.2d 1111

November 10, 1983, Argued, January 17, 1984, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 82 B 9841, 82 B 9851 —William T. Hart, Judge.

DISPOSITION: Appeal Dismissed and Mandamus Denied.

POSNER, Circuit Judge. The district court in a bankruptcy proceeding refused to appoint a representative to file claims on behalf of individuals who may develop asbestosis or other lung diseases in the future from past exposure to asbestos manufactured and sold by the bankrupt, 29 Bankr. 741 (N.D. Ill. 1983), and the bankrupt has appealed. The first and last issue we consider is the appealability of the judge's order.

In 1982 a group of affiliated corporations (collectively, UNR) petitioned under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 et seq. The ground for the petition (as for Johns-Manville's, pending in the Southern District of New York, and Amatex's, pending in the Eastern District of Pennsylvania) is that UNR cannot satisfy its enormous tort liability, actual and potential, resulting from the thousands of asbestosis suits that have been or will be brought against it by shipyard workers and others who have inhaled fibers from asbestos that it manufactured. See

Note, The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings, 96 Harv. L. Rev. 1121 (1983); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573, 806-07, 845 (1983); Note, Manville: Good Faith Reorganization or "Insulated" Bankruptcy, 12 Hofstra L. Rev. (forthcoming 1984). Although UNR represents that it stopped manufacturing asbestos in 1970, some of its asbestos remained (and no doubt remains to this day) in shipyards and other places where people are exposed to airborne asbestos fibers; and in any event it is sometimes not until many years after last inhaling the fibers that one develops a diagnosable case of asbestosis (a term we use broadly to refer to any asbestos-related disease). Already a defendant in more than 17,000 asbestosis suits, UNR expects to be sued by 30,000 to 120,000 new asbestosis victims as their disease manifests itself and is diagnosed. Compare Walker et al., Projections of Asbestos-Related Disease 1980-2009, 25 J. Occupational Med. 409 (1983).

Believing that its ability to formulate a workable plan of reorganization might depend on its being able somehow to remove the enormous cloud of potential tort liability represented by the prospective suits, UNR in October 1982 filed in the bankruptcy court an "Application for the Appointment of a Legal Representative for Unknown Putative Asbestos-Related Claimants." UNR's hope was that if such a representative were appointed, he might, under the supervision of the bankruptcy court, negotiate with UNR some arrangement whereby all potential asbestosis claims could be fixed and discharged in the final plan of reorganization, along with the claims of UNR's existing asbestosis and other tort and contract creditors. See Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System, 61 Tex. L. Rev. 1297, 1314 (1983). UNR might set up a revolving fund out of which the representative would pay possible future plaintiffs a fraction of their tort claims as they accrued, or it might purchase

annuities for them. And it then could operate free of the threat to solvency posed by the prospective claims.

At about the same time that UNR's application was filed, the Supreme Court handed down its decision in *Northern Pipeline Construction Co. v. Marathon PipeLine Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), invalidating the provision of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, that vests the exercise of the district courts' bankruptcy jurisdiction in bankruptcy judges who do not enjoy the guarantees of judicial independence in Article III of the Constitution. Interpreting the Supreme Court's decision as invalidating only the subsection of the new Act that provides, "The bankruptcy court . . . shall exercise all of the jurisdiction conferred by this section on the district courts," 28 U.S.C. § 1471(c), and not the preceding subsections, 28 U.S.C. §§ 1471(a) and (b), which vest original jurisdiction over bankruptcy in the district courts, the United States District Court for the Northern District of Illinois, by direction of the Seventh Circuit Judicial Council acting pursuant to 28 U.S.C. § 332(d)(1), adopted on December 20, 1982, as a General Order, a proposed rule drafted by the Judicial Conference of the United States under authority of 28 U.S.C. § 331. The rule, so far as it bears on this case, allows the district court to hear any part of a bankruptcy case. (The rule is printed in 1 Collier on Bankruptcy, insert preceding ch. 3 (15th ed. 1983). The background of the rule is described, and its validity defended, in *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 259-62 (6th Cir. 1983).) It was pursuant to the General Order that Judge Hart considered and denied UNR's application to appoint a representative. His ground for denial was that people who have not yet developed asbestosis do not have claims that can be proved in bankruptcy. See 11 U.S.C. § 101(4)(A).

If this appeal had been filed before the passage of the Bankruptcy Reform Act of 1978, there would be no doubt about

appealability; for section 24(a) of the previous Bankruptcy Act, 11 U.S.C. § 47(a) (1976 ed.), with qualifications not material to this case, explicitly allowed appeals to be taken from interlocutory bankruptcy orders of district judges to the courts of appeals. See 1 Collier on Bankruptcy, supra, para. 3.03[7][b] at pp. 3-289 to 290. But the 1978 Act repealed section 24(a) in regard to proceedings, such as this Chapter 11 proceeding, begun after October 1, 1979. Bankruptcy Reform Act of 1978, Pub. L. 95-598, Title IV, §§ 401(a), 402(a), 403(a), 92 Stat. 2549, 2682-83. It also created a new system of appellate review of bankruptcy orders. This system involves three routes for appealing final orders of bankruptcy judges: to panels consisting of three bankruptcy judges; to the district court, in districts where no such panels are created; and directly to the court of appeals, if the parties agree. See 28 U.S.C. §§ 160(a), 1293(b), 1334(a), 1482(a). An interlocutory order of a bankruptcy judge may also be appealed—to a panel of three bankruptcy judges or to the district court, as the case may be—but only with leave of the panel or court. See 28 U.S.C. §§ 1334(b), 1482(b). The new system of appellate review of bankruptcy orders is not to be fully effective, however, till April 1, 1984. Until then, during the "transition period" as it is called, "the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments [that the new Act makes to the Judicial Code, see 28 U.S.C. §§ 1293, 1334, 1482] to hear appeals from the judgments, orders, and decrees of the bankruptcy courts. . . ." Bankruptcy Reform Act of 1978, Pub. L. 95-598, Title IV, § 405(c)(2), 92 Stat. 2685. The appeal in this case was taken during the transition period.

A threshold question is whether Judge Hart, in denying UNR's application, was acting as a bankruptcy judge or as a district judge. If the former, his order, even if final, could be appealed to us only with the consent of the parties, and some of the parties

have not consented. But it is evident that the General Order does not make district judges bankruptcy judges but rather shifts some of the bankruptcy judges' jurisdiction back to the district judges, pursuant to the grant of jurisdiction to the district courts in 28 U.S.C. §§ 1471(a) and (b). Cf. *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 199-200 (3d Cir. 1983). Any other interpretation would make no sense from the standpoint of creating an orderly system of appellate review. During the transition period as afterward, orders of bankruptcy judges can be appealed only to a bankruptcy panel or the district court, unless the parties agree to come to this court. It would be weird to have an order of a district judge appealed to a panel of bankruptcy judges —quite apart from constitutional objections based on the Marathon decision—or to another district judge; and there is no provision, statutory or otherwise, for having a district judge's order reviewed by a panel of district judges.

The validity of the General Order revesting original bankruptcy jurisdiction in district judges is supported by decisions in several circuits. See *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983); *Kaiser v. Salomon*, 722 F.2d 1574, slip op. at 1114 (2d Cir. 1983); *White Motor Corp. v. Citibank, N.A.*, supra, 704 F.2d at 262-64; *In re Hansen*, 702 F.2d 728, 729 (8th Cir. 1983) *(per curiam); In re Braniff Airways, Inc.*, 700 F.2d 214, 215 (5th Cir. 1983) *(per curiam);* but see Countryman, Emergency Rule Compounds Emergency, 57 Am. Bankr.L.J. 1 (1983). Although this court has not yet considered the validity of the General Order in an adjudicative setting, we must determine our own jurisdiction to review the district judge's order before we can decide his jurisdiction to issue it; and for the limited purpose of determining whether the district judge's order is appealable, we need only decide whether the General Order vests jurisdiction in the district judges as district judges. And clearly it does that. The next question is how a bankruptcy order issued by a district judge is appealed during the transition period. The only provision in the

new Bankruptcy Act relating to appeals from district courts to courts of appeals, 28 U.S.C. § 1293(b), makes "a final judgment, order, or decree of . . . a District Court" appealable to the court of appeals. But there is a question whether this provision operates during the transition period. As noted earlier, section 405(c)(2) of the new Act gives the courts of appeals during this period the same jurisdiction as is conferred on them for the subsequent period by specified provisions of the Bankruptcy Reform Act—including the provision that creates 28 U.S.C. § 1293(b)—"to hear appeals from the judgments, orders, and decrees of the bankruptcy courts. . . ." But we do not have a judgment, order, or decree of the bankruptcy court, but of the district court. Such an analysis led the Tenth Circuit, in *In re Glover, Inc.,* 697 F.2d 907, 909 (10th Cir. 1983) (*per curiam*), to hold that section 1293(b) does not operate during the transition period.

Although there is contrary authority in the Third Circuit, see *In re Marin Motor Oil, Inc.,* 689 F.2d 445, 447-48 (3d Cir. 1982); *Universal Minerals, Inc. v. C.A. Hughes & Co.,* 669 F.2d 98, 101 (3d Cir. 1981), it hardly matters which circuit is right. If section 1293(b) is not applicable during the transition period, then section 1291 is, and the two sections are materially the same. Section 1291 allows appeals to the courts of appeals from "final decisions" of the district courts, and "decision" in section 1291 means judgment, order, or decree. (See 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3906 at p. 427 (1976), on "judgment" and "decree"; as for "order," the very name of the "collateral order" doctrine—a doctrine of interpretation of section 1291, as we shall see later in this opinion—is revealing.) And while "finality," interpreted functionally, might mean something different in a bankruptcy case from what it does in other cases, section 1291 is flexible enough to be applied differently depending on circumstances. Cf. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949); *In re Saco Local Development Corp.,* 711 F.2d 441, 444 (1st Cir. 1983).

Perhaps radically differently, in some circumstances: the *Marin* case held that a district judge's order allowing intervention in a bankruptcy case—an order that would not have been final in any other kind of case—was final and appealable, because there was nothing further to be done by the district judge, whose function in the case was a purely appellate one. See 689 F.2d at 447-49. The court of appeals suggested that its result might have been different if section 1291 rather than (as it thought, contrary to the Tenth Circuit's view in *Glover*) section 1293(b) had been controlling. But it is not the difference between the statutes—their language is materially the same as we have said—but the difference of circumstances that best explains the result in *Marin*. In any event, our case is not at all like that, and we need not decide therefore whether we agree or disagree with the Third Circuit's approach.

We come at last to the heart of the appealability issue, which is whether Judge Hart's order was "final." There is an obvious sense in which it was not. It did not wind up the litigation before the district court; the bankruptcy reorganization goes on. But lack of finality in this sense is not fatal to the appeal. Orders disposing of claims filed against the bankrupt estate while the bankruptcy proceeding is pending are much more like final judgments in ordinary civil suits than like interlocutory orders in such suits. See, e.g., *In re Bestmann,* 720 F.2d 484, 486 (8th Cir. 1983). If an asbestosis victim sues a solvent manufacturer of asbestos and the court dismisses the complaint, the dismissal is, of course, a final judgment. Under the former bankruptcy procedure, an asbestosis victim usually would sue a bankrupt asbestos manufacturer in just the same way; if he won he would file his judgment as a claim against the bankrupt in the bankruptcy proceeding, see 11 U.S.C. § 103(a)(1) (1976 ed.); and if the claim was denied he could appeal the denial. See *In re Saco Local Development Corp.,* supra, 711 F.2d at 444-45. But this was a cumbersome procedure, and a major change brought about by the Bankruptcy Reform Act of 1978 was to authorize the bankruptcy court to adjudicate

claimants' rights under tort law, thus merging the tort determination with the claim determination. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 18, 153 (1978); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* supra, 102 S. Ct. at 2862-63. (This expansion in the bankruptcy courts' power was a major reason why the Supreme Court held in *Marathon* that the new bankruptcy judges created by the Act were exercising powers reserved to Article III judges, and why in turn the General Order revested the bankruptcy judges' powers in the district judges.) When a claim is denied under the new procedure created by the Act, it is even clearer than under the former procedure that the denial is the equivalent of a final tort judgment and is therefore appealable consistently with conventional principles of finality.

UNR argues that in refusing to appoint the representative the district judge in effect denied the claims that the representative would have presented; and if this is right, the refusal would be appealable, as we have just seen. But we do not think it is right. Although the judge refused to make the appointment because he believed that such claims would have no status in bankruptcy, you cannot appeal from the implications of what a judge does as distinct from the actual order he enters. If a judge denied a plaintiff's request for a discovery order because he believed the plaintiff's case had no merit, the plaintiff could not appeal from that order; he would have to wait till the district judge dismissed the complaint. It is the same here. By denying the appointment of a representative on the ground he did the district judge telegraphed his punch; it is now highly predictable that when and if someone who has been exposed to asbestos manufactured by UNR but has not yet developed a diagnosable case of asbestosis files a claim against UNR in this bankruptcy proceeding the judge will deny the claim. But he has not done so yet.

Nor are we persuaded that his action is tantamount to denial because if no representative is appointed no member of the class

sought to be represented will realize that he may have a claim and attempt to file it. Of the 30,000 to 120,000 people who UNR thinks may one day contract asbestosis and sue UNR for the damages resulting from their disease, some must already be aware that they may be ticking time bombs, and the very active plaintiffs' asbestosis bar will surely bend every effort to make the other aware. As a matter of fact a man named Robinson, who says he was exposed to asbestos sold by UNR but has not yet developed asbestosis, moved to intervene in the district court to oppose UNR's application for appointment of the representative. Robinson's motion was denied and he has not filed an appeal from the denial. His motion was not an attempt to file a claim and the denial of the motion was not the denial of a claim, but the motion shows that at least one member of the class of possible future asbestosis victims is aware of his situation and prepared to litigate in reference to it.

As we do not think the district judge's order has the effect of denying the claims of such victims, it is not a final order in a conventional bankruptcy sense, and is appealable if at all only under the "collateral order" doctrine created by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp., supra.* This doctrine allows orders that are not final in the sense of disposing of the entire lawsuit before the district court, but are final in the sense of irrevocably deciding the rights of a party, to be appealed under 28 U.S.C. § 1291. The order appealed in *Cohen* denied a motion to require the plaintiff to post an indemnity bond guaranteeing reimbursement of the defendant's cost of the action if the plaintiff lost. The Supreme Court held that the order "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. The rationale is similar to that of 28 U.S.C. § 1292(a)(1), which allows appeals

from orders granting or denying preliminary injunctions. See 337 U.S. at 545. An order at the end of the litigation requiring the plaintiff to post a bond would come too late to help the defendant. Either the plaintiff would have the resources to reimburse the defendant or he would not, and if he did not there would be no indemnitor to whom the defendant could look for payment. As a practical matter therefore the determination that the defendant sought to appeal would have become moot if the appeal had been postponed to the end of the district court proceeding.

In contrast, *United States v. Dorfman,* 690 F.2d 1230, 1231-32 (7th Cir.1982), where criminal defendants appealed from an order unsealing wiretap transcripts, on the ground that the publication of the transcripts would invade a statutory right of privacy, did permit an appeal to be taken under the *Cohen* doctrine, because the defendants' privacy would be "gone forever as soon as the media began disseminating their news stories; and it is doubtful, to put it mildly, that if the appellants ultimately convinced this court or the Supreme Court that the motion had been improperly granted, they could get any monetary redress." Id. at 1232. But in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981), the Supreme Court held that an order denying a motion to disqualify counsel was not appealable, because if the denial of the motion was improper the error could be corrected on appeal from the final judgment. The Court emphasized the lack of "irreparable harm" from denial of an immediate appeal, see 449 U.S. at 376, 378 n. 13, thus picking up the suggestion in *Cohen* that the purpose of the collateral-order doctrine is closely related to that of section 1292(a)(1), which allows immediate appeal of an order granting or denying a preliminary injunction because an erroneous such order must, virtually by definition, cause irreparable harm to one of the parties.

Thus, for an order to be appealable under the *Cohen* doctrine its consequences for the appellant must be irreversible by sub-

sequent proceedings. *In re Continental Investment Corp.*, 637 F.2d 1, 5 (1st Cir. 1980). There is nothing irreversible, at least so far as the potential asbestosis plaintiffs themselves are concerned, about the district court's order refusing to appoint someone to represent them. Any such victim is free to file a claim with the district court, and if the claim is denied to appeal the denial to us as a final decision. And he can if he wants try to file a claim on behalf not only of himself but of others who have been exposed to asbestos sold by UNR but have not yet developed a diagnosable case of asbestosis. The judicial process will benefit from waiting for an actual claim to be filed. When that happens the district court—and, if it dismisses the claim and the dismissal is appealed, the court of appeals—will have before it a concrete claim and not merely speculation about potential claimants. This will create a more informative context for deciding whether the interests of potential victims of asbestosis can be dealt with—whether one-by-one or in gross—in this bankruptcy proceeding.

True, there is much learning that mass-disaster torts in general and asbestosis cases in particular are unsuitable for class-action treatment. See, e.g., *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852-54 (9th Cir. 1982); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974); Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323 (1983). We need not decide whether this learning would carry over to the bankruptcy context, whether it is entirely sound (a proposition questioned in Judge Williams' article), and whether in any event it is applicable to the unusual situation presented here, where each claim, because it is an estimate of a possible future harm rather than a definite past harm, will be smaller than the usual mass-disaster tort claim and therefore more needful of class treatment. These questions, too, would be presented in a more illuminating context if we had before us an actual claimant, not merely the bankrupt

raising a procedural question before an actual claim has been filed.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978), which held that orders refusing to certify suits as class actions under Rule 23 of the Federal Rules of Civil Procedure are not within the scope of the *Cohen* doctrine, bears directly on this case. When class certification is denied, many and sometimes all members of the class may be unable as a practical matter to get any relief against the defendant; their claims may be too small to make it worth their while to sue individually. Nevertheless the Court in *Livesay* refused to apply the *Cohen* doctrine and dismissed the appeal. The situation here is parallel. It may be that if no representative of potential victims of asbestosis is appointed many of those potential victims will not file claims against the bankrupt estate until too late. Yet the situation of the potential victims is actually better than that of members of a class when class certification is refused. Any member of the "class" that UNR wants a representative appointed for can, without incurring the cost of bringing an independent lawsuit, file a claim with the district court; and if the court denies his claim he can appeal immediately to us. If we decide on appeal that such claims are proper in bankruptcy the district judge will have to reexamine his refusal to appoint a representative for the potential claimants —the basis of his refusal (that the persons who would be represented have no rights in bankruptcy) having been destroyed.

Since some potential claimants might be discouraged by the fact that Judge Hart, in refusing to appoint a representative for them, expressed the view that they have no rights in bankruptcy, we emphasize that the correctness of his view (criticized in Roe, Bankruptcy and Tort: The Problem of Mass Disaster, 84 Colum. L. Rev. (forthcoming 1984)) is an open one in our minds. The practical difficulties of identifying, giving constitutionally adequate notice to, and attempting to estimate the damages of the

thousands upon thousands of people who have been exposed to asbestos sold by UNR but have not yet developed asbestosis are formidable, and possibly insurmountable. Yet if any of them have already suffered a tort there would be no basis we can think of for not letting them file claims in this bankruptcy proceeding. And some, at least, probably have suffered a tort. The states differ on whether a cause of action in an asbestosis case accrues upon inhalation (see, e.g., *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1010-11, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244 (1981); *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, slip op. at 1119 (7th Cir.1983)) or not until there is palpable disease (see, e.g., *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570 (7th Cir. 1982)) or the disease is discovered (see, e.g., *Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759, 764 (S.D.W. Va. 1981)). See generally Note, supra, 12 Hofstra L. Rev. at nn. 118-27 and accompanying text. Even in a "discovery" state the cause of action may "exist" before it "accrues"—that is, before the statute of limitations on bringing it begins to run. See *Moore v. Jackson Park Hospital*, 95 Ill. 2d 223, 232, 447 N.E.2d 408, 411-12, 69 Ill. Dec. 191 (1983); but see *Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 761, 394 N.E.2d 1369, 1376, 32 Ill. Dec. 30 (1979). These states postpone the date of accrual of the cause of action not in order to prevent the early filing of claims but in order to lift the bar of the statute of limitations to later filings. Since there is "medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter," *Keene Corp. v. Insurance Co. of North America*, 215 U.S. App. D.C. 156, 667 F.2d 1034, 1042 (D.C. Cir. 1981), and since no particular amount of injury is necessary to create tort liability, courts in these states might hold that a tort claim arises as soon as asbestos fibers are inhaled, however much time the victim might have for bringing suit. In any event, some at least of the many thousands of workers who have been exposed to asbestos sold by UNR must have been exposed in states such as Indiana and New York where the cause

of action accrues upon inhalation, and their claims against the bankrupt estate—accrued tort claims—would appear uncontroversially to be provable in bankruptcy.

Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an unaccrued tort claim cannot be a "claim" within the meaning of 11 U.S.C. § 101(4)(A) (that is, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"), a bankruptcy court's equitable powers (on which see, e.g., *Pepper v. Litton,* 308 U.S. 295, 304, 84 L. Ed. 281, 60 S. Ct. 238 (1939); 1 Remington, A Treatise on the Bankruptcy Law of the United States § 22 (Henderson 5th ed. 1950)) just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization. The date on which a person exposed to asbestos happens to develop a diagnosable case of asbestosis is arbitrary. Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to the end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done," 308 U.S. at 305 (especially, perhaps, in a reorganization case, see *In re Michigan Brewing Co.,* 24 F. Supp. 430 (W.D. Mich. 1938)), to prevent the liquidation of the bankrupt before provision is made for such persons? And more than arbitrariness is involved. If future claims cannot be discharged before they ripen, UNR may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern. In that event, and assuming that UNR's going-concern value would exceed its liquidation value, both UNR (which is to say the creditors who will own UNR at the conclusion of the reorganization) and future plaintiffs would be made worse off, and UNR's current creditors would not nec-

essarily be made better off, by the court's failure to act along the lines proposed by UNR.

But against all this it can be argued, returning to our first point, that it would be a quixotic undertaking far beyond the realistic boundaries of judicial competence to make sufficiently generous provision for upwards of a hundred thousand unidentified claimants to justify extinguishing their claims involuntarily; that even if only a small fraction of the claims were not extinguished the cloud of potential liability over UNR's head might still be too large for it to emerge from bankruptcy as a going concern with fair prospects of surviving in the long run; and that, as Judge Hart said, the solution to this problem must come from Congress.

Fortunately we need not decide these difficult and far-reaching questions here; their very difficulty, and far-reaching nature, are reasons for our refusing to decide them prematurely through a permissive interpretation of 28 U.S.C. § 1291. We merely point out that they are substantial questions which the district court did not finally decide when it turned down the application to appoint a representative and on which the district court in any event does not have the final say.

We thus far have considered the question of irreversible consequences—the key to appealability under the *Cohen* doctrine—from the standpoint of possible future asbestosis victims, the people for whom UNR wanted the district judge to appoint a representative, rather than from the standpoint of UNR itself, though the motive for UNR's application was self-interest rather than altruism. It can be argued, and UNR does argue (though as a subordinate theme), that the denial of its application will, unless that denial is promptly reversed, have irreversible consequences for it; that by making it impossible for UNR to discharge potential as well as actual asbestosis claims Judge Hart has made it impossible for UNR to emerge successfully from the reorganiza-

tion proceeding. But this argument confuses an interim procedural ruling with the terms of the final plan of reorganization. Cf. *In re Kutner,* 656 F.2d 1107, 1111 (5th Cir. 1981). When a final plan is approved (see 11 U.S.C. §§ 1126-1144) that makes no provision for possible future asbestosis victims, UNR will be able to appeal to us from the order adopting the plan, see, e.g., *In re Carbide Cutoff, Inc.,* 703 F.2d 259 (7th Cir. 1983); *In re Fondiller,* 707 F.2d 441, 442 n. 1 (9th Cir. 1983), assuming it is not so hopelessly insolvent at that point that it is indifferent to the terms of the reorganization, see id. at 442. And it will be able to argue on appeal that the plan is defective because of the failure to make provision for potential asbestosis victims. If we agree and reverse, the district court will then appoint a representative or take whatever other steps may be necessary to comply with our instructions. And probably UNR will not have to wait that long. If one or more potential victims of asbestosis file or attempt to file a claim, the district court may decide to reconsider its refusal to appoint a representative for them. Cf. *Coopers & Lybrand v. Livesay, supra,* 437 U.S. at 469 and n. 11. And if it does not, and denies the claim, and is reversed and the matter remanded, the question whether to appoint such are presentative will appear to it in a wholly new light.

We realize that reorganizations can be protracted and that the finality rule of section 1293(b) presupposes an opportunity for interlocutory appeals that *Marathon* has deprived the parties of. In the scheme of the 1978 Act, before *Marathon* knocked out key provisions of it, an order such as the district judge made in the present case would have been made by a bankruptcy judge, and though interlocutory his order would have been appealable either to a panel of three bankruptcy judges or to the district court, with the permission of either the panel or the court as the case may be. So there would have been some appellate review, if leave to appeal would have been granted. There has been none here. But the confused situation created by the *Marathon* holding will be

clarified by new legislation, and this proceeding returned in its entirety to a bankruptcy judge, long before a final plan of reorganization is confirmed. And if the bankruptcy judge issues the same order that the district judge has issued, and that order is appealed to the district court, the district court's order may be a final order appealable to us under the teaching of the *Marin* case. For all these reasons the issue that UNR wants us to decide will probably come before us again before the final plan of reorganization is confirmed.

UNR asks us, if we dismiss the appeal, to mandamus the district judge to certify his order for an immediate appeal under 28 U.S.C. § 1292(b). All other objections to the application aside, the prematurity of UNR's appeal would make us unwilling to entertain a discretionary appeal at this time. APPEAL DISMISSED AND MANDAMUS DENIED.

APPENDIX E

IN RE UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC. and FOLDING CARRIER CORP., Debtors-Appellants, v. BLOOMINGTON PLANT WORKERS and JAMES WALKER, Appellees.

In re UNR INDUSTRIES
Case No. 92 C 6396

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 502

January 18, 1994, Decided, January 21, 1994, Docketed

MEMORANDUM OPINION AND ORDER MARVIN E. ASPEN, District Judge:

Appellant UNR Industries, Inc. ("UNR") and appellees Unarco Bloomington Plant Workers ("Workers") are no strangers to this Court. In 1990, having ruled on virtually all issues raised by Workers in their appeal from three orders entered by the Bankruptcy Court relating to the reorganization of UNR (the Injunction Appeal, the Confirmation Appeal, and the Trust Appeal), we concluded that we could not resolve certain issues relating to Workers' Confirmation Appeal or their Asbestos Disease Trust Appeal until Judge Coar determined how the Workers' asbestos claims would be classified under the plan—as Class 2 Workers' Compensation claims, or as Class 5 Asbestos Disease Trust claims. Accordingly, we remanded the case to the Bankruptcy Court to classify the Workers' claims. In a lengthy opinion, Judge Coar ruled that the Workers had both Class 2 and Class 5 claims. UNR's appeal from that ruling is presently before us.

I. Factual Background[1]

This case dates back to 1982, when UNR and its subsidiaries filed petitions for Chapter 11 protection in the face of thousands of asbestos-related lawsuits. In 1989, UNR filed its Plan of Reorganization and Disclosure Statement. The Plan divided UNR's stock among six classes of creditors. Class 2 claims, which were to be paid in full, consisted of Workers' Compensation Claims. The Plan defined Worker's Compensation claims as: Workmens' [sic] Compensation Claims subject to the terms of the Court's July 29, 1982 Order granting Application to Authorize Payment of Pre-Petition Workmens' [sic] Compensation Claims Accrued Vacation Pay, Warranty Claims and to Permit Issuance of Credit Memoranda, the Payment of Customer Deposits, Advertising, Allowances and the Issuances of Rebates to Customers. UNR Exh. J at 24. Similarly, the Plan provided that "the allowed amount of all claims in Class 2 shall be paid in the ordinary course of the respective Debtors' businesses pursuant to the terms of the Court's July 29, 1982 Order granting Application to Authorize Payment of Pre-Petition Workmens' [sic] Compensation Claims . . . and the Issuance of Rebates to Customers." Id. at 25. Elsewhere, the Disclosure Statement declared that "there are no pre-petition Workmen's Compensation Claims which remain unpaid." Id. at 12. Class 5 claims are Asbestos-Disease Claims, to be paid out only through the Asbestos-Disease Trust ("Trust"). Unlike Class 2 claims, Class 5 claimants will not be fully compensated for their losses, but will be paid some approved fraction of their claim.[2]

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[1]For a review of the case history, see *Unarco Bloomington Factory Workers v. UNR Industries*, 124 Bankr. 268 (N.D. Ill. 1990); *In re UNR Industries, Inc.*,143 Bankr. 506 (N.D. Ill. 1992).

[2]Under the Plan, Class 5 claims will be liquidated in a manner agreed upon by a Plaintiffs' Committee and the Legal Representative after notice and hearing. In the event no agreement can be reached, the Court will step in and establish resolution methods after notice and hearing. UNR Exh. J at 25.

Workers, whose asbestos disease claims amount to roughly $18,000,000, filed objections to both the Disclosure Statement and the Plan, arguing, among other things, that it was unclear how the Workers' claims were classified under the Plan. These objections were overruled and the Plan was approved.

As a condition precedent to entry of the Confirmation Order, the bankruptcy court entered an Injunction Order in June, 1989 prohibiting asbestos-disease claimants from litigating their claims outside the Asbestos-Disease Trust ("Trust"). Despite the Injunction, Workers' attorney, James Walker ("Walker"), initiated numerous actions against UNR seeking relief on their occupational disease claims. Consequently, on December 10, 1987, Judge Coar enjoined Walker from bringing any further actions against UNR, finding that the attorney's actions were vexatious and caused needless expense for the estate in violation of the automatic stay. When Walker continued to litigate the Workers' claims, UNR filed a Motion for Order of Contempt, which Judge Coar granted on March 20, 1990 after notice and hearing. In the contempt Order, Judge Coar found that Walker had abrogated the 1989 Injunction, the December 10, 1987 Order, and 11 U.S.C. § 524(a)(2). UNR Exh. S at 4. He therefore enjoined Walker from "taking any action, naming UNR as a respondent, or continuing an existing proceeding in which UNR is a respondent, in support of his efforts to advance the cause of Applicants." Id. at 10-11.

On July 30, 1991, Walker filed another petition with the Industrial Commission regarding Workers' claims. Consequently, UNR moved again for a civil contempt order. Before ruling on this motion, Judge Coar issued his July 29, 1992 Classification Order, holding that some of the Workers' occupational disease claims properly fell within Class 2 Workmen's Compensation claims. In keeping with this conclusion, Judge Coar vacated his

March, 1990 contempt order against Walker and denied the pending contempt motion.[3]

On September 17, 1992, after Judge Coar issued his Classification Order, UNR moved this Court to end further proceedings on the Confirmation Appeal on the grounds that, based on the classification of their claims, the Workers had no standing to contest the confirmation. Five days later, UNR appealed Judge Coar's classification decision. Because that appeal was originally assigned to Judge Milton I. Shadur, we were unaware of its pendency during our deliberations on UNR's motion to end further proceedings. Over Workers' objections, we granted the motion on December 10, 1992 and ended proceedings on Workers' appeal of the Plan's confirmation. That decision is currently before the Seventh Circuit on appeal.

Now, having been reassigned from Judge Shadur, we have before us UNR's appeal from the bankruptcy court's classification decision, its vacation of the 1989 contempt finding, and its denial of the 1991 motion for civil contempt.

II. Discussion[4]

Before we can reach the merits of UNR's appeal, we must address Workers' contention that this Court lacks jurisdiction to hear this appeal. Workers argue that Judge Coar's Classification

[3]In explaining his decision to vacate his earlier ruling finding Walker in contempt, Judge Coar wrote as follows:

According to UNR, Mr. Walker's attempt to obtain payment on some of the Workers' occupational disease claims could only have violated the Injunction Order if those claims are not classified as Class 2 claims under the Plan, for the Injunction Order does not prohibit Class 2 claimants from enforcing their rights to receive payments under the Plan. In light of this Court's analysis of the 1982 Order, the Court has reconsidered the Memorandum Opinion and Order of March 29, 1990, and now withdraws them. . . . In re UNR Industries, Inc., 143 Bankr. at 527.

[4]The Official Committee of the Unsecured Creditors and Class 4 Disbursing Agent have sought leave to file a reply brief in support of UNR's

(footnote continued on following page)

Order is an interlocutory order that merged with this Court's entry of final judgment on Workers' Confirmation Appeal. Alternatively, Workers maintain that, having relied on the Classification Order in seeking to end further proceedings, UNR has waived any objections it might have to Judge Coar's ruling and is estopped from challenging the Order now. Because we have already ruled that UNR is not estopped from appealing the Classification Order, we will not address that portion of the Workers' contention.

There is little question that this case is procedurally muddled. Should we consider and then grant UNR's appeal from the Classification Order, it would run afoul of our earlier decision to end further proceedings in the Confirmation Appeal. In turn, because our decision to end those proceedings is itself on appeal before the Seventh Circuit, we no longer have the authority to vacate our earlier decision should the need arise. Moreover, any decision disturbing the classification of Workers' claims would potentially render the Seventh Circuit's deliberations meaningless.

It is well-settled that "an appeal suspends the power of the court below to proceed further in the cause, except to take such steps as will assist the appellate court in its determination." *United States v. O'Connor*, 874 F.2d 483(7th Cir. 1989) (citing *United States v. Bastanipour*, 697 F.2d 170, 173 (7th Cir. 1982), cert. denied, 460 U.S. 1091, 103 S. Ct. 1790, 76 L. Ed. 2d 358 (1983)). Because a decision in this matter could impinge upon issues presently before the Seventh Circuit, then, we lack jurisdiction over the Classification Order. Accordingly, we will not proceed on this portion of UNR's appeal.

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appeal. Workers object to this request, arguing that any such permission would open the floodgates for multiple such filings, causing the Workers unnecessary work and depleting the value of UNR's stock. Given the complexity of this appeal, we see no reason to bar any briefs that might shed light on the issues presented. Accordingly, we grant the Committee's motion, but make clear that this ruling does not guarantee the allowance of further submissions by the Committee.

Although we lack jurisdiction to hear UNR's Classification Appeal, the same is not necessarily true of the company's appeal from Judge Coar's decision to vacate his first contempt ruling against James Walker and Judge Coar's denial of UNR's second contempt motion. However, given the parties' cursory treatment of the contempt appeals, and in light of our ruling on the Classification Appeal, we believe that this issue warrants further briefing. Specifically, more in-depth treatment is necessary regarding the nature of the two contempt orders—that is, the parties should address whether Judge Coar's decisions to vacate the first contempt finding and to deny the second contempt motion are final appealable orders or interlocutory orders, and if they are interlocutory orders, with what final orders did they merge.[5] Additionally, the parties should discuss how our inability to review Judge Coar's Classification Order affects our jurisdiction to review the contempt rulings and/or how this decision impacts our substantive review of the contempt orders.[6] Finally, we observe that the present briefs are completely devoid of any analysis regarding the standard of review of bankruptcy contempt findings and rulings under Bankruptcy Rule 9024, and of how these standards should be applied to the instant decisions to vacate and deny. With these guidelines in mind, UNR is directed to file a supplemental brief in support of its appeal from Judge Coar's contempt rulings on or before January 27, 1994, Workers are to respond on or before February 4, 1994, and UNR is to reply by February 10, 1994. A status hearing is set for March 8, 1994, 10:30 a.m.

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[5]Although the parties have tipped their hats to this issue, their analysis is woefully inadequate.

[6]The parties should consider the possibility that no consideration of the underlying Classification Order is necessary given (1) Judge Coar's apparent reliance on his December 10, 1987 injunction against Walker in making his first contempt finding, and (2) the allegation in UNR's second contempt motion that, inter alia, Walker violated the injunction contained in Judge Coar's prior contempt order.

III. Conclusion

For the foregoing reasons, we deny UNR's appeal from the bankruptcy court's Classification Order and defer ruling on UNR's appeals from certain contempt rulings pending further briefing. It is so ordered. MARVIN E. ASPEN United States District Judge Dated 1/18/94.

APPENDIX F

UNARCO BLOOMINGTON FACTORY WORKERS, Appellants, v. UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC., (Alabama), UNR-ROHN, INC., (Indiana), JOBAL TUBE CO., INC. and FOLDING CARRIER CORP., Defendants.

UNARCO BLOOMINGTON FACTORY WORKERS
v. UNR INDUSTRIES

Case No. 89 C 5220, Related No. 90 C 2180

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

165 Bankr. 198; 1993 U.S. Dist. LEXIS 5111
April 13, 1993, Decided, April 19, 1993, Docketed

Appeal from Bankruptcy Court Consolidated Case Nos.
82 B 9841-9845, 82 B 9847, 82 B 9849 and 82 B 9851

MEMORANDUM OPINION AND ORDER MARVIN E. ASPEN, District Judge:

Appellants UNARCO Bloomington Factory Workers ("Workers") originally appealed from several orders entered by the Bankruptcy Court relating to the reorganization of UNR Industries, Inc. and ten of its subsidiaries ("UNR"). Workers appealed issues relating to the confirmation of the reorganization plan ("Confirmation Appeal"), an injunction ("Injunction Appeal"), and an asbestos disease trust ("Trust Appeal"). In Unarco I[1] we disposed of the Injunction Appeal, in Unarco II[2] we ended further proceedings on the Confirmation Appeal. Now, all that remains is the Trust Appeal. Workers have appealed from two

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[1]*Unarco Bloomington Factory Workers v. UNR Industries, Inc.* 124 Bankr. 268(N.D. Ill. 1990) ("Unarco I").

[2]*Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, No. 89 C 5220 (N.D. Ill. Dec. 10, 1992).

orders entered by the Bankruptcy Court, one approving the Trust Agreement and Claims Resolution Procedures by which asbestos disease claimants may pursue claims against the asbestos disease trust ("Trust") provided for in the Confirmation Order, and one requiring claimants to follow the Trust procedures for resolving claims before bringing any action in court to liquidate the value of claims. The Trustees of the Trust ("Trustees") now move to dismiss the Trust Appeal as moot. For the reasons set forth below, we grant their motion.

I. Factual Background[3]

Under UNR's reorganization plan, confirmed in June, 1989, a trust was to be created to assume and resolve the company's asbestos health claims. The Bankruptcy Court approved the initial terms of the Trust in May, 1989. On June 9, 1989, Workers filed a notice of appeal from the original Trust, as well as from the plan confirmation and an injunction prohibiting claimants from suing the reorganized UNR or the insurers settling with the company. Workers then unsuccessfully sought a stay pending appeal from the Bankruptcy Court, the District Court, and the Seventh Circuit Court of Appeals.

Meanwhile, the designated Trustees, concerned by various provisions in the original Trust, submitted recommended changes in an Application for Supplemental Order Approving the UNR Asbestos-Disease Claims Trust Documents. In February, 1990, the Bankruptcy Court approved the amendments, and further ordered claimants to utilize the established claims resolution procedures before filing a lawsuit (collectively, "Trust Orders"). Again, Workers appealed the original Trust as well as the Trust Orders, but this time they did not seek a stay pending appeal.

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[3]A comprehensive factual history of this appeal is set forth in our original decision, *Unarco I,* 124 Bankr. 268 (N.D. Ill. 1990). At this time, we will only restate those facts necessary for the disposition of this motion.

The Trustees sought to have the Trust Appeal dismissed as moot, arguing that since the Trust Orders were entered, "too much [had] happened for the eggs to be unscrambled. At that time, however, we found that "for the most part, [the Trust's] actions [had] been purely administrative in nature," and "as far as we [could] discern, no payments [had] yet been made to any claimants under the Trust." *Unarco I* at 283. Additionally, we found that the Workers' failure to seek a stay of the Trust orders did not create grounds for "equitable mootness." See e.g., *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981). In reaching this conclusion, we took into account the fact (1) that the Workers had unsuccessfully attempted to obtain a stay of the Trust Orders, and (2) that the Workers based their decision not to seek a stay of the Trust Orders on the good faith and well-founded belief that such an effort would have been futile. We observed, however, "that a request for a stay of only the Trust Orders might have received different treatment when presented on its own. . . ." *Unarco I* at 281. Although we denied Trustees' motion to dismiss, we declined to rule on the merits until the Bankruptcy Court classified the Workers' claims on remand.

From the remand until now, the Workers have not sought a stay of the Trust Orders. Consequently, the Trustees have begun resolving claims. Under the approved Trust Agreement and Procedures, claimants have three options in liquidating their claims. Option One requires no valuation of the claimant's injury, providing simply for immediate payment of a flat sum. Options Two and Three both require valuation of a claimant's award, and then either immediate partial payment and staggered payments over time (Option Two), or a deferred claim (Option Three).

From late 1991 until the present, the Trust has paid out more than $31,000,000 in liquidating approximately 75,000 claims, out of the more than 163,000 claims filed with it. All of the resolved

claims were liquidated under Option One, with no money having been paid out, to date, under Options Two or Three.[4]

II. Discussion

Trustees seek to dismiss Workers' Trust Appeal as moot. Arguing that Workers failed to obtain a stay of the Trust Orders pending appeal, and that, in the absence of a stay, the Trust has processed and liquidated tens of thousands of claims, Trustees contend that the Court can no longer grant Workers effective relief. We agree.

A. Failure to Obtain a Stay

Trustees maintain that, under the equitable mootness doctrine, Workers are estopped from bringing this appeal since they failed to obtain, or even seek, a stay of the Trust Orders pending appeal. See e.g., *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981). In addition to other factors, when applying the mootness rule, "a court may consider whether, within the facts of the case, it would be highly inequitable to reverse the Bankruptcy Court's order." *In the Matter of Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992), citing *In re Roberts Farm*, 652 F.2d at 798. There is no dispute that Workers promptly sought a stay of the original Trust approval, nor is it controverted that the Bankruptcy Court, the District Court, and the Seventh Circuit denied their request. Finally, we found Workers' decision not to repeat their efforts to gain a stay following their appeal of the Trust Orders to be reasonable and made in good faith. Trustees contend, however, that Workers have been dilatory in failing to seek a stay since *Unarco I*.

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[4]The Trustees claim that the Trust has amended the process whereby it liquidates Option Two claims and expects to resolve thousands of such claims this year.

In *Unarco I*, this Court expressly observed that

> a request for a stay of only the Trust Orders might have received different treatment when presented on its own, out of the context of the earlier request for a stay as to the Injunction and Confirmation Orders which pertained more comprehensively to the reorganization as a whole, as opposed to only a relatively discrete aspect of the Plan.

Unarco I, 124 Bankr. at 281. Nonetheless, Workers failed to seek a stay of the Trust Orders, despite the fact that Trustees began sending notices to potential claimants and settling claims.

Parties are not required to seek or obtain a stay pending appeal, particularly when they believe that such an effort would amount to a futile waste of legal and judicial resources. See *In re AOV Industries, Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *In re Public Service Company of New Hampshire*, 963 F.2d 469 (1st Cir. 1992). Workers contend, as they did in Unarco I, that in light of their unsuccessful efforts to seek a stay at the outset, they reasonably and in good faith believed that further efforts would be useless.

While we found this to be true at an earlier stage of the litigation, it is less so now. Effectively, Workers have sat by as the Trust implemented the Trust Orders. Consequently, claimants made decisions about which liquidation option to elect based upon the approved claims procedure, and Trustees liquidated claims and paid out millions of dollars as calculated and required under the Trust Order. In light of our observation in Unarco I, and the large-scale activation of the Trust, Workers could, and should, have sought a stay to preserve the status quo and the possibility for relief. In the absence of a stay, Trustees were entitled to treat the Trust Orders as final, and begin liquidating claims according to their provisions. The consequence of Workers' lack of diligence, then, is that circumstances may have mooted their appeal.

B. Practicability of Relief

In general, "a court may consider a challenge to a reorganization plan moot and unreviewable 'when implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available.' " *Andreuccetti*, 975 F.2d at 418, quoting *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 841 F.2d 92, 96 (4th Cir. 1988). That is, if a court would be unable to grant effective relief to the appellant, were he to prevail, then it should dismiss the appeal as moot. In determining whether a given appeal is moot, a court should weigh the interests of finality, the extent of the plan's consummation, and the degree to which circumstances have changed and impacted the potential for effective relief. Id. Courts, then, are charged with the delicate task of balancing parties' good-faith reliance on a judgment and confirmation, and an appellant's right to seek review of an adverse, and possibly flawed, order. Id.

In undertaking this endeavor, the Seventh Circuit has declared that "the reviewing court must 'scrutinize each individual claim, testing the feasibility of granting relief against the potential impact on the reorganization scheme as a whole.' " Id. quoting *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 473 (1st Cir. 1992). In this spirit, we will examine the issues on appeal to determine what relief appellants seek, and whether such relief is practicable at this point.

Although Workers have designated six issues on appeal, some of these issues simply represent alternative grounds for the same relief. Rather than looking a teach issue in turn, then, we will evaluate the relief sought to ascertain whether we are in a position to provide it.[5]

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[5]Because the Trust is a critical component of the reorganization plan, we will treat relief that significantly threatens or affects the Trust as impracticable.

(i) Liquidating Claims in Article III Courts

On several different grounds, Workers seek the right to have their claims liquidated in an Article III court, rather than through the Trust and Claims Resolution Procedures.[6] Workers further maintain that changing the liquidation procedure to allow claimants to value their claims before an Article III judge is still practicable at this juncture, since Option One claims, the only claims that have been resolved, did not require valuation and therefore are unaffected by changes in the valuation procedures. This view, however, misses the point.

While Option One claims do not require valuation, Trustees point out that the three options, and their procedures, are interrelated—one cannot be changed without affecting the others. For example, had Option One claimants known they could have their claims valued in a jury trial before an Article III judge, they might have elected Option Two or Three.

Similarly, the amount of the flat payment available under Option One is contingent upon the liquidation procedures established for Options Two and Three. The purpose of the Trust is to equitably compensate claimants from a limited fund. Accordingly, in calculating the amount of the flat payment to be made under Option One, Trustees had to assess the likely costs associated with liquidating the Option Two and Three claims. In making these computations, Trustees relied on a relatively litigation-free valuation process for Option Two and Three claims. Changing the liquidation procedure to include valuation in an Article III court would significantly raise the costs of resolving claims under Options Two and Three and, consequently, lower the appropriate amount of the flat payment under Option One.

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[6]Workers claim that forcing creditors to liquidate their tort claims through the Trust and Claims Resolution Procedures violates their Due Process rights and runs afoul of 28 U.S.C. § 157(b)(2)(B). Workers' Brief at p. 4.

In light of the large number of claims already settled under Option One, and the vast sums paid out, it is too late to recalculate the amount of the flat payment, nor is it practical or desirable to reclaim the Option One payments. Accordingly, we dismiss as moot those portions of the appeal seeking valuation of claims in an Article III court.

(ii) Voiding the Trust Amendments

On several different grounds, Workers contend that the Bankruptcy Court erred in approving amendments to the Trust and Claims Resolution Procedures after the original Trust was approved.[7] The relief for such errors, presumably, is to reverse that court's decision to approve the amendments, thus reestablishing the original trust and its resolution procedures.[8] In order to determine whether this relief is practicable, we must first determine what changes this would effect in the claims resolution process currently in place.

Workers offer us a critical bit of guidance in their brief. They explain that if workers prevail on these issues, they would be entitled to have their claims valued in a jury trial before an Article III judge. Workers' Brief at p. 6. As we explained above, however, the introduction of a more costly valuation procedure now would wreak havoc on the calculations already made in reliance on the current procedure as well as the choices already made by claimants in electing Option One, Two, or Three. These portions of Workers' appeal, then, must also be dismissed as moot.

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[7]Workers contend that the post-confirmation amendments were material modifications in violation of 11 U.S.C. § 1127, were negotiated by parties in a conflict of interest, and "effected changes so sweeping as to eliminate all common features of a trust facility, and create an entirely different scheme of duties, indemnity obligations and claim procedures than what were presented to asbestos claimants who voted for UNR's plan." Workers' Brief at pp. 5-6.

[8]We note that workers object to the original trust as well.

(iii) Adding Creditor Safeguards

Finally, Workers seek to import additional creditor safeguards into the Trust and Claims Resolution Procedures, claiming that, under the Bankruptcy Code, creditors are entitled to swift payment processing, control of expenses, restriction of payments to existing creditors, and the right to object to other claims.[9] Relief for such claims would entail equipping the Trust with the outlined safeguards.[10]

At the very least, the addition of some of the requested creditor protections would raise Trust costs. Enhanced levels of Trustee liability would raise insurance premiums, while resolving contested claims would result in additional costs and delays. As discussed above, however, any material changes in liquidation costs impacts decisions irreversibly made about the flat payments.

In addition to affecting costs, other requested protections could well alter Trust objectives. As we read it, the Trust is charged with settling all current and future claims. Workers envision a system in which the Trust pays only existing creditors. In addition to embracing a very different notion of the Trust's purpose, such a proposal would significantly affect the disbursement of money to claimants under the three options. With a smaller pool of creditors to pay, the flat payment under Option One might well have been larger. The payments under Option One, however, have already been made, and the deadline for choosing Option

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[9]Workers argue that the Bankruptcy Court erred in a approving a resolution procedure "which fails to provide basic creditor safeguards inherent in the Bankruptcy Code for distribution of a limited fund." Workers' Brief at p. 4.

[10]Workers also contend that because the Trust provisions allow the Trustees to amend the procedures at any time, the relief they seek must be available.

One has already passed. The eggs, then, have already been scrambled.[11]

While some of the requested safeguards, like swift payment processing and control over Trust and Claims Procedure expenses, seem innocuous enough, they, like the others, involve hidden expenses. In sum, the imposition of additional safeguards at this point would involve higher Trust costs, and might well involve more important structural and philosophical departures from the goals on which the Trust is predicated. Accordingly, the relief for this claim is effectively unavailable to Workers, and their appeal is therefore moot.

III. Conclusion

For the foregoing reasons, we grant appellees' motion to dismiss. It is so ordered.

MARVIN E. ASPEN United States District Judge Dated 4/13/93

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[11]While it is possible for the Trust to recalculate the flat payment under Option One, supplement those claimants' settlements, and then reopen the deadline for choosing Option One to accommodate those claimants who might be drawn by the higher payments, the mootness doctrine is designed to prevent just this sort of large scale altering of a plan that is well underway. See *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1555 n.7 (11th Cir. 1987), cert. denied, 488 U.S. 823, 109 S. Ct. 69, 102 L. Ed. 2d 46 (1988).

APPENDIX G

UNARCO BLOOMINGTON FACTORY WORKERS, Appellants, v. UNR INDUSTRIES, INC., UNARCO INDUSTRIES, UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP., Debtors. UNARCO BLOOMINGTON FACTORY WORKERS, Appellants, v. UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP., Debtors

UNARCO BLOOMINGTON FACTORY WORKERS v. UNR INDUSTRIES

Case Nos. 89 C 5220, 90 C 2180

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

124 Bankr. 268 December 6, 1990

Appeal From Bankruptcy Court Consolidated Case Nos: 82 B 9841-9845, 82 B 9847, 82 B 9849 and 82 B 9851; Chapter 11 Proceedings; Before Bankruptcy Judge David H. Coar.

MEMORANDUM OPINION AND ORDER MARVIN E. ASPEN, United States District Judge

The appellants, Bloomington Factory Workers ("Workers"), have appealed from certain orders entered by the bankruptcy court pertaining to the reorganization of the debtors. We have before us the Workers' appeal from the entry of an injunction order by the bankruptcy court, and motions to dismiss as moot the Workers' appeal from the confirmation order and two orders of the bankruptcy court approving a trust agreement and claims resolution procedure and requiring claimants to follow procedures established by the Trust for resolution of claims prior to bringing any action in court to liquidate values of claims.

I. Factual And Procedural Background

On July 29, 1982, UNR Industries, Inc., and ten of its subsidiaries and affiliates filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code ("the Code"), 11 U.S.C. § 101 et seq. The cases were consolidated for procedural purposes. The principal reason stated by UNR for the filing of the bankruptcy petitions was their involvement as defendants in over 17,000 asbestos-related personal injury lawsuits pending in various state and federal courts, exposing them to potential liabilities, high damages, and substantial costs of legal services. Uncertainty as to the extent of these potential liabilities, exacerbated by the refusal of UNR's product liability insurance carriers to defend and indemnify UNR in the asbestos litigation, allegedly placed UNR in an untenable financial position with its institutional lenders. Thus, UNR sought the protection of Chapter 11.

A. Confirmation and Injunction

Much had transpired in the courts since July of 1982 in arriving at a viable plan of reorganization, but at last, on June 1, 1989, the bankruptcy court entered an order confirming UNR's Plan of Reorganization ("Confirmation Order"). Under the Plan, UNR will pay in full all workers' compensation, administrative and secured claims, as defined in the Plan. UNR's trade creditors and stockholders will receive approximately 37% of new UNR stock issued in accordance with the Plan for claims held prior to UNR's bankruptcy. Prepetition UNR stockholders will retain about eight percent of the company plus receive warrants to purchase more shares at a price fixed slightly higher than market for the stock prior to confirmation of UNR's Plan.

Victim's of asbestos disease are placed in a separate class of individuals for which the Plan makes provision. The class includes asbestos victims who know they have claims against UNR. It also incorporates those who may have been exposed to UNR's

asbestos products before the bankruptcy, before confirmation, or after confirmation, but do not yet have an injury or know they have an injury ("Future Claimants"). These individuals do not receive stock directly from UNR. Instead, 63 or 64% of the total of newly issued shares is to be distributed to a trust ("Trust") with the announced purpose of liquidating and paying a portion of both existing claims as well as any claims that may arise in the future as a result of asbestos related injuries. None of these asbestos disease victims will be fully compensated for their injuries. Existing claims will be paid on a pro rata basis. In addition, once an existing claim is liquidated and the Trustees determine the amount to be awarded, they must hold back a portion of the award to ensure that all present and future claimants receive a similar percentage of their claims.

In conjunction with entry of the Confirmation Order on June 1, 1989, the bankruptcy court also entered an order ("Injunction Order") which permanently enjoins all present and future asbestos health claimants from taking any action, directly or indirectly, for the purpose of collecting, recovering or receiving payment of an asbestos disease claim against UNR or any insurance company that settles with UNR. The Injunction was designed as a supplement to the statutory injunctive provisions of Section 524 of the Bankruptcy Code, principally to protect New UNR's stock from being adversely affected as a result of suits by Future Claimants against the reorganized company.

B. The Trust

On May 25, 1989, just prior to entry of the Confirmation Order, the bankruptcy court granted application for the approval of the UNR Asbestos-Disease Claims Trust. The Workers' original appeal from that order was dismissed as premature because the Trustee nominees had refused to accept the Trust as approved and therefore the trust arrangement had to be modified and a new trust proposed. It was not until February 22, 1990, that the

bankruptcy court entered two orders, one approving the Trust Agreement and Claims Resolution Procedures, and the other requiring claimants to follow the procedures established by the Trust for the resolution of claims prior to bringing any action in court to liquidate values of claims ("Trust Orders"). On February 23, 1990, the Trustees executed the Trust Agreement and assumed their duties as Trustees. They have met on several occasions since that date and have taken a series of measures to implement the Trust.

C. The Present Appeals

The Workers are individuals, or their representatives, who were employed at the UNARCO plant in Bloomington, Illinois. This plant manufactured asbestos products from the early 1950's through 1970. All of the workers were diagnosed as suffering asbestos disease from their exposure to asbestos inside the UNARCO plant. Although the Workers were employees of Unarco and suffered asbestos-related injuries as a result of their exposure to asbestos in the course of their employment, there is dispute as to whether their claims against the estate are Class 5 Asbestos-Disease Claims, subject to the Trust, or Class 2 Workmen's Compensation Claims, or both. See UNR Response at 21, 36 n.18 (claiming that the Workers are members of Class 5); Workers' Brief at 23 (disputing that the definition of worker's compensation claims in the Plan excludes prepetition claims of employees); Workers' Reply at 19 (indicating that Workers may have tort claims against UNR, independent of their workers' occupational disease claims).[1]

The Workers have appealed from the Injunction, Confirmation, and Trust orders. The Injunction Appeal is before us on the merits. Prior to a briefing on the merits of the other two appeals, however, UNR has moved to dismiss the appeal from the

[1]The significance of this dispute will be discussed in further detail below.

Confirmation Order as moot and the Trustees of the UNR Asbestos-Disease Claims Trust have moved to dismiss the appeal from the Trust Orders as moot.

II. Injunction Appeal

The Workers' challenge the June 1, 1989 Injunction Order on the following grounds. The Workers maintain that the bankruptcy court did not have subject matter jurisdiction to enter an injunction binding future claimants and that such an injunction, to the extent it purports to adjudicate the rights of persons who do not yet possess claims, violates Article III of the Constitution which limits federal court jurisdiction to actual "Cases and Controversies." The Workers also contend that the bankruptcy court lacked the power to enter the Injunction insofar as it bars the Workers from recovering under workers' compensation bonds, policies and funds pledged to the State. The Workers further claim that the bankruptcy court had no authority under Section 105 or in equity to enter the injunction because 1) the Injunction violates state criminal laws forbidding employers from restraining employees from pursuing their rights under workers' compensation laws; 2) the Injunction conflicts with Section 524(e) of the Bankruptcy Code by discharging the claims of non debtors; and 3) the Injunction impermissibly channels claims to a limited fund without preserving priorities to that fund. Finally, the Workers argue that, based on the evidence, the issuance of the Injunction was clearly erroneous.

A. Standing

UNR and several of the amici that filed briefs in opposition to the Workers' Injunction Appeal first contend that the Workers lack standing to challenge the Injunction Order. UNR relies on the principle that a person who seeks to appeal an order of the bankruptcy court must be directly and adversely affected pecuniarily by it. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641

(2d Cir.), *cert. denied, Mac Arthur v. Johns-Manville Corp.*, 488 U.S. 868, 109 S. Ct.176, 102 L. Ed. 2d 145 (1988). UNR maintains that the specific challenges raised by the Workers as grounds for their appeal relate only to rights and interests of the future claimants. UNR therefore seeks dismissal of the Workers' entire appeal as an impermissible assertion of the future claimants' rights by the Workers, as opposed to the assertion of their own interests.

In response, the Workers correctly point out that UNR has overstated its premise for dismissal of the entire appeal since several of the Workers' challenges clearly relate to the Injunction's direct affect on their own economic interest. These challenges derive from the Injunction's regulation of the Workers' pursuit of workers' compensation claims and civil suits against New UNR and other parties. The Injunction Order prohibits the Workers from pursuing any claims against UNR and certain insurance companies other than through the Trust mechanism, which will assure them at best of only of partial recovery of their claims. The Workers undoubtedly possess a pecuniary interest in the resolution of such challenges sufficient to confer standing to raise them on appeal.

Specifically with respect to the Injunction's provisions concerning the Future Claimants, however, UNR contends that the Workers may not assert the rights and interests of the Future Claimants because the Workers' interest is opposed to that of the Future Claimants. But the Workers rely on precisely that point in arguing that their economic interest is directly affected by provisions in the Injunction concerning Future Claimants. The Workers do not purport to act as proponents of the rights of the future claimants. Rather, the Workers maintain that they have standing to argue that the bankruptcy court had no jurisdiction to include future claimants within the Injunction since a ruling on that issue would directly affect the Workers' pro rata share of recovery from UNR's bankruptcy.

The Workers' ultimate goal evidently is to bar Future Claimants from recovery out of the proceeds allocated to the Trust Fund, thereby ensuring a greater pool of money available to pay the Workers' claims. From that perspective, the Workers' economic interest is directly affected by the inclusion or exclusion of the Future Claimants in the pool of claimants seeking to recover from the Trust; the Workers are affected pecuniarily only to the extent the future claimants are allowed to make claims against the money in the Trust. The Injunction Order, however, is not the vehicle by which that interest is affected. The Plan, as approved by the Confirmation Order, and the subsequent orders implementing the Trust provide the authority and procedures for future claimants to be paid out of the Trust. A finding, for whatever reason, that the bankruptcy court could not enjoin suits brought by Future Claimants would have no direct effect on whether or not the Workers would have to share Trust funds with the Future Claimants. The Workers' pecuniary injury is tied to that sharing arrangement, not to any prohibition against bringing suit. Accordingly, the Workers do not have standing to challenge the Injunction Order insofar as it concerns the prohibition of suits brought Future Claimants. Cf. id. at 641 (limiting appeal to contentions that assert a deprivation of appellants own rights).

B. Substantive Challenges to the Injunction

1) Actions on workers' compensation bonds

During the confirmation hearing, the Workers objected to the Injunction on the ground that it would prevent them from recovering against surety bonds and excess insurance pledged to the State of Illinois by UNR to guarantee that UNR's employees are paid for their workers' compensation and occupational disease claims. Ill. Rev. Stat., Ch. 48, para. 138.4 et seq. and para. 172.36 et seq. (1987). The bankruptcy court indicated that it was not prepared to adjudicate the Workers' alleged rights under those bonds at the confirmation hearing, and expressly reserved

jurisdiction to consider whether the Injunction order encompassed the workers' compensation bonds and policies introduced by the Workers at the hearing. To date, however, the Workers have not sought such a determination from the bankruptcy court.

Instead, shortly after confirmation, the Workers resumed proceedings against New UNR before the Illinois Industrial Commission. These proceedings had been stayed during UNR's Chapter 11 case. This action supposedly was taken in order to collect from the bonds, policies and a public fund. As a result of that action and at UNR's request, the bankruptcy court conducted an evidentiary hearing on March 20, 1990, and entered an order finding the Workers' counsel in contempt of court.

In light of the contempt citation against their counsel, the Workers contend that bankruptcy court has impermissibly construed the Injunction to bar them from recovering under the workers' compensation bonds, policies and funds pledged to the State. The Workers, however, have incorrectly characterized the basis for the contempt order.[2] The bankruptcy court found Workers' counsel in contempt based on a finding that Workers' counsel knew or should have known that the Injunction, of which he was clearly aware, prohibited further attempts to proceed with the claims before the Industrial Commission without first obtaining leave of court. See Mem. op. dated March 20, 1990, at 6 (UNR Ex. E). Acknowledging the Worker's objections to the scope of the Injunction and the bankruptcy court's jurisdiction to enter it, the bankruptcy court censured Worker's counsel for failing to seek a modification of the order as to scope, or to appeal on the jurisdictional issue prior to taking action before the Commission. Id. at 7-8. The bankruptcy court's primary concern was that the

[2]Workers' counsel apparently has not appealed from the contempt order. In certain respects, the portion of the Workers' appeal that we address in this section would appear to constitute a collateral attack on the contempt order. We shall consider the contempt proceedings only insofar as they bear upon the substantive attack on the Injunction.

Workers' proceedings before the Industrial Commission named Unarco and UNR as respondents. The bankruptcy court pointed out that if Workers' counsel "wishes to file an independent action not naming the Debtors, that may be a horse of a different color. That, however, is not the case before the Court today. . . . The Court orders Walker to restrain from taking any action, naming the Debtors as respondents, in support of his efforts to advance the cause of the Appellants." Id. at 8, 11.

Thus, the bankruptcy court's order was not predicated on a resolution of the issues concerning the scope of the Injunction with respect to an action only on the bonds. Accordingly, the matter has not been finally decided. The bankruptcy court had retained jurisdiction for the specific purpose of ascertaining whether or not the bonds, policies or funds constituted property of the estate and would therefore be subject to the permanent prohibitions of the Injunction. The Workers' proper remedy therefore is to obtain a ruling from the bankruptcy court as to these issues. Accordingly, we dismiss the appeal from this aspect of the Injunction as premature.

In so doing, we reject the Workers' broad contention that the bankruptcy court lacked jurisdiction to make any determination whatsoever with respect to the bonds, policies and actions before the Industrial Commission. The bankruptcy court clearly possesses jurisdiction to determine its own jurisdiction. Additionally, it has jurisdiction to decide whether matters involve property of the estate. The Workers' argument is predicated on the assumption that the actions on the bonds and policies before the commission have been permanently foreclosed by the Injunction. In light of the bankruptcy court's retention of jurisdiction to consider precisely that issue, the assumption is clearly erroneous.

We acknowledge that, in retrospect, the Injunction as presently and temporarily construed may in fact be too broad—if the bankruptcy court ultimately finds that Workers' position with respect

to the bonds is correct. But until that final determination has been made, the present breadth of its scope is within the equitable power of the bankruptcy court to impose. Indeed, the Workers have never contested the enforcement of the automatic stay that temporarily enjoined prosecution of their Industrial Commission actions filed prior to confirmation, although consistent with the case upon which they now rely, *In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981), they might have raised such a challenge.[3]

2) Section 105 and equitable authority to enter the Injunction

a) Violation of state criminal law

The Workers argue that the Injunction exceeded the court's authority to enter it because it violates state criminal laws that forbid employers from restraining employees from pursuing their workers' compensation claims under the Illinois Workers' Occupational Diseases Act. Ill. Rev. Stat., Ch. 48, para.172.36 et seq. (1987).

We first observe that the Workers do not deny UNR's claim that the Workers failed specifically to raise this argument before the bankruptcy court. The Workers only made generalized allegations of illegality which focused on the Injunction's provision for Future Claimants. At no point did the Workers refer to the Illinois statute or present to the bankruptcy court the argument

[3]In *Mansfield Tire*, the court concluded that: Paying claims out of either the Insurance Fund or the posted surety bonds does not result in the enforcement of a money judgment against the debtor or its estate. Mansfield does not, and could not, claim any interest, legal or equitable in those surety bonds. The continuing administration of the workers' compensation claims will, therefore, have absolutely no effect on the estate of the debtor. Id. at 1115. We make no finding, however, concerning the relevance or precedential effect of that conclusion. That is a matter that first should be addressed to the bankruptcy court.

they now wish to make before us. Having failed to raise this issue below, the Workers are precluded from raising it on appeal.

In any event, in addition to this procedural preclusion, the argument substantively is without merit. The Workers rely on Illinois Revised Statutes, Ch. 48, para. 172.39, which provides:

> (h) It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce any employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this [Workers' Occupational Disease] Act.

The Workers contend that UNR, by instituting the contempt proceedings discussed above, is using the Injunction Order to restrain the Workers from pursuing their workers' compensation and occupational disease act rights in violation of this criminal statute. This argument is directed at the conduct of UNR, which is undeniably an employer within the meaning of the statute. UNR's conduct, however, relates to the enforcement of an order of a bankruptcy court. Therefore, the only restraint on the Workers' pursuit of their workers' compensation rights comes by virtue of the Injunction Order and not by UNR's efforts to enforce the Order; UNR's conduct is meaningless outside the context of the Order. And it is plainly evident that this criminal provision does not control the action of any court with respect to workers' compensation claims. Thus, there is no basis for finding that the Order violated state criminal law.

The Workers make two additional points that we will briefly consider. They first contest UNR's assertion that the Workers no longer possess workers' compensation rights by virtue of UNR's discharge in bankruptcy under section 524 of the Bankruptcy Code. The Workers reiterate that a portion of the Workers' rights relate to recoveries from parties other than UNR on the surety bonds and a public security fund. They claim that the Injunction is illegally interfering with those rights. As we have indicated, however, the bankruptcy court has yet to decide whether the

Injunction reaches those claims. And even if the bankruptcy court finally decided that the Injunction should prohibit the claims, the Illinois statute does not criminalize the actions of a federal court. The Workers' only proper avenue of redress from such an order would be with this Court.

The Workers also maintain that the Plan retains the Workers' rights against UNR by providing that prepetition workers' compensation claims shall be paid in full, and therefore the confirmation of the Plan did not discharge the Workers' employee rights against UNR. At the outset, we find this argument curious, since the predicate for the argument is that Workers are entitled to full recovery of benefits under the Plan as Class 2 workers' compensation claimants. Yet, the Workers have spent a good portion of their briefs arguing how they will be adversely affected by the Plan's provision for Future Claimants as the Class 5 Asbestos-Disease Claimants. Looking to other portions of the briefs, this contradiction may be explained by the fact that the Workers apparently believe they possess both occupational disease and tort claims against UNR. It is also evident that UNR disputes that the Workers' are entitled to any recovery within Class 2. Clearly, this too is matter for the bankruptcy court to initially determine or clarify.

Leaving that concern aside, we see no basis for the Workers' contention that their claims have not been discharged. Regardless of whether the Workers' may be deemed to possess Class 2 or Class 5 claims, or both, the Workers are clearly preconfirmation creditors whose prepetition occupational disease rights and tort law rights have been eliminated by confirmation of the Plan. See, 11 U.S.C. §1141(a) (provisions of a confirmed plan bind any creditor); *In re Columbia Packing Co.*, 34 Bankr. 403 (Mass. 1983) (workers' compensation claims against the debtor may be treated as general unsecured claims). The Workers terminology that these rights have been "retained" by the Plan is incorrect insofar as the Workers imply that claims based on those rights have

somehow been excepted from discharge. Those rights as against UNR may now only be enforced by filing a claim with the bankruptcy court and seeking a distribution in accordance with the Plan. Indeed, the Injunction Order notwithstanding, further action against New UNR by the Workers based on these claims is prohibited by the injunction which arose automatically under Section 524(a)(2) of the Code upon confirmation of the Plan.

b) Injunction against Settling Insurers

The Workers next challenge the bankruptcy court's authority to enjoin suits against the products liability insurers ("Settling Insurers" or "Insurers") who settled with UNR. They claim that such a prohibition is inconsistent with Section 524(e) of the Bankruptcy Code which states: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debt." Section 524(e) has been construed to permit a tort claimant to sue a debtor's tort liability insurer despite discharge. *In re Jet Florida Systems, Inc.*, 883 F.2d 970 (11th Cir. 1989). The Workers maintain that without the Injunction, UNR's Insurers would still be liable to them for asbestos claims.

There are several problems with this argument. As a threshold matter, the Workers' argument rests on two assumptions: that they possess rights under the policies issued by those carriers and that Illinois law would allow a direct action against the Insurers. Yet it is undisputed that each of the insurance policies at issue contains an exclusion for workers' compensation and occupational disease claims. Thus, to the extent the Workers' claims arise under the Occupational Diseases Act, even without the Injunction, any action against UNR's comprehensive general liability carriers would be barred by the express exclusions contained in the policies. Recognizing this point, the Workers assert that they additionally possess intentional tort claims against UNR that could be covered by policies containing exclusions for employee claims. The Workers, however, have failed to cite any

Illinois authority that would allow them to bring direct actions against the insurers on the policies. Thus, on the record they have presented, their assumption lacks the requisite foundation for asserting such a claim of right.

In addition, even if such authority existed we do not believe it would extend to allow recovery against insurers who had settled in good faith with their insureds. The policy discussed in *Jet Florida Systems,* which at common law supports a direct action against an insurer when the insured is insolvent, is not implicated in this case. In *Jet Florida Systems,* the court was concerned that the "fresh start" policy of the Bankruptcy Code not be used as a defense against a common law action to

> provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured. . . . Far from holding that insurers should be protected from liability, . . . the insurance company should not be entitled to gain a benefit that was not intended or in any way computed within the rate charged for its policy. Id. at 975 (citation omitted).

Such a concern with the potential for a windfall to the insurer does not come into play, however, when an insurer has reasonably satisfied its contractual obligations to indemnify its insured for the claims made against it. As long as such a settlement has been reached in good faith, there is no reason for allowing a party to sue the insurer directly, since the insurer normally owes no direct obligation to such parties. To allow such a suit after settlement presents the opposing risk that the insured will enjoy the windfall. Thus, we are of the view that once the Insurers reached a good faith settlement with UNR, any direct obligation which might otherwise have been imposed at common law to the Workers on behalf of UNR were discharged. Accordingly, even with respect to the purported intentional tort claims, the Workers effectively did not have any rights against the settling Insurers to enjoin.

Moreover, even if we go beyond the state law predicate, the same reasoning applies in the bankruptcy context to support the conclusion that Section 524(e) does not limit the bankruptcy court's equitable jurisdiction to enjoin suits against the settling insurers. Here, the bankruptcy court approved UNR's settlements with the insurers and found that the monies consequently paid to UNR by the settling carriers constituted property of the estate. The Workers neither objected to, nor appealed from, any of these orders. Thus, the orders are binding upon the Workers. Acknowledging this fact, the Workers contend that even if the policy proceeds are estate property, the only case to dismiss the conflict with Section 524(e) was *In re A.H. Robins Co.,* 880 F.2d 694, 702 (4th Cir. 1989), and in doing so, the Fourth Circuit rejected the Seventh Circuit's decision in *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982). Having made such an assertion, however, the Workers have failed to discuss how these two cases relate to the present situation.

In our view, the two cases are not entirely inapposite. *A.H. Robins* effectively limited or distinguished *Newboles,* but did not reject it outright. In approving an injunction similar but, in important respects, even broader than the one at issue here, the Fourth Circuit in *A.H. Robins* stated:

> Some courts have held that § 524(e) and its predecessor, § 16 of the Bankruptcy Act, results in the bankruptcy court having no power to discharge liabilities of a non debtor pursuant to consent of creditors as part of a reorganization plan. See . . . *Newboles*. . . . However, the Fifth Circuit has stated that 'although section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of reorganization.' *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

A.H. Robins, 880 F.2d at 702 (footnote omitted). The Fourth Circuit concluded

> In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue other parties, and where the entire reorganization hinges on the debtor being free from indirect claims *such as suits against parties who would have indemnity or contribution claims against the debtor,* we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits.

Id. (emphasis added). All of these considerations apply in this appeal and weigh strongly in favor of affirming the Injunction. But such a result must accord with *Newboles*.

In *Newboles,* two personal guarantors of a promissory note executed by the debtor sought to avoid their own liability on the note to promisee Union Carbide. The guarantors argued that their liability was erased by Union Carbide's approval of the plan which provided that acceptance of a discharge payment would constitute a full settlement not only against the debtor but also "against any other persons or entities who have entered into guaranty or indemnity agreements with unsecured creditors or who have endorsed commercial paper for the benefit of the Debtor." *Newboles*, 686 F.2d at 594. They maintained that such approval of the plan and acceptance of a discharge payment from the debtor worked an accord and satisfaction under Indiana Law which the district court was obligated to respect. Finding that a bankruptcy discharge arises by operation of federal bankruptcy law, and not by contractual consent of the creditors, the Seventh Circuit held that just as bankruptcy court has no power to discharge the liabilities of a bankrupt's guarantor, a creditor's approval of the bankruptcy plan does not discharge the bankrupt's guarantors either. Id. at 595. The Seventh Circuit predicated this holding on Section 16 of the 1898 Bankruptcy Act, which is identical to Section 524(e) in all relevant respects.

Certainly in *Newboles*, the equitable factors upon which the court in *A.H. Robins* relied in affirming an injunction did not exist. Further, the guarantors in *Newboles* received a complete discharge of liability without giving anything in return to the estate or to the creditors who had relied upon their guarantee. An additional reason for not protecting such guarantors from suit is that they possessed an independent obligation to satisfy the notes, an obligation that ran directly to the creditor Union Carbide. In this case, we find it significant that the Injunction does not foreclose suits against insurers or other guarantors who had not reached a settlement with UNR prior to confirmation. These non settling insurers are in a position similar to that of the insurer in *Jet Florida* and the guarantors in *Newboles*, who sought to avoid any liability on their obligations simply by virtue of the discharge of the debtor. If the Injunction prohibited suits against these insurers (assuming such suits may be brought), the potential conflict with Section 524(e) is more apparent and a consideration of the equitable factors in *A.H. Robins* might then be required.

The Settling Insurers, by contrast, are in a different situation, one which we believe escapes any conflict with Section 524(e) and therefore does not require us to decide whether the approach of the Fourth Circuit in *A. H. Robins* should be applied here. The Insurers' obligations on the policies were settled by UNR, and those settlements were approved by the bankruptcy court as part of the process of settling claims against property of the estate. The bankruptcy court undeniably possessed authority to settle claims involving the property of the estate, in this case, the insurance policies. The Workers have at no time contested the bankruptcy court's finding that it was in the best interests of the estate to accept the substantial cash payments made on the policies by the Settling Insurers rather than to carry on the expensive, hazardous and burdensome litigation that had dragged on through the courts for over six years. Significantly, all of these events occurred prior to discharge. Once the proceeds of the insurance litigation

became part of the estate, the bankruptcy court clearly had authority to protect that property. Although the Seventh Circuit has not directly addressed the Section 524(e) issue, it has specifically approved of the principle that the power of the bankruptcy court under Section 105(a) includes the power to issue an injunction enjoining third parties from pursuing actions which are the exclusive property of the debtor estate and are dismissed pursuant to a settlement agreement. *In re Energy Cooperative, Inc.*, 886 F.2d 921, 929 (7th Cir. 1989) (citing *MacArthur Co. v. Johns Manville Corp.*, 837 F.2d 89 (2nd Cir.), *cert. denied*, 488 U.S. 868,109 S. Ct. 176, 102 L. Ed. 2d 145 (1988) (affirming district court's order approving settlement between debtor and insurers and enjoining all future suit against insurers relating to settled policies).[4] Accordingly, the Injunction was necessary to preserve the settlement that was approved as part of there organization prior to discharge. Similar to the common law analysis above, Section 524(e) is not implicated since at the time of discharge, the Settling Insurers no longer had obligations under the policies that might improperly have been affected by the discharge of UNR on its debt.

c) Channeling of claims to a limited fund.

In their final jurisdictional challenge, the Workers assert that an injunction which channels claims to a limited fund without preserving priorities to that fund is invalid. The Workers maintain that even if the bankruptcy court had authority to settle portions of the insurance litigation, the bankruptcy court was obligated to preserve what the Workers contend is the asbestos

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[4]Although Section 524(e) was never expressly mentioned in *MacArthur*, the issue as framed by the appellant required substantially the same analysis required here. The appellant argued that the injunctive orders constituted a *de facto* discharge in bankruptcy of non debtor parties not entitled to the protection of Chapter 11. *MacArthur*, 837 F.2d at 91.

claimants' priority to the insurance proceeds and a trust that is fully funded to pay all claims. The Workers object to the fact that, unlike the channeling order pioneered in the Manville case, all of the insurance proceeds will not go to the asbestos victims' trust, but rather that some will be paid to New UNR to capitalize its business operations. They are concerned that since UNR shareholders and trade creditors retain a 37% stake in UNR, they will in effect receive 37% of the insurance proceeds. Thus, they argue that UNR's Plan and the Injunction "combine to effectively reorder priorities in the insurance proceeds by taking away 37% of the funds from the tort victims and turning them over to UNR shareholders and trade creditors." Workers' Brief at 30.

Here too, however, the Injunction itself does not effect the "channelling" about which the Workers now complain; it is the Plan which has that effect. The more appropriate place to raise such a challenge would therefore be in the Confirmation Appeal, which is presently subject to a motion to dismiss. Thus, we shall take up this issue below.

3) Clear error

The Workers' finally contend that the bankruptcy court's issuance of the Injunction was improper due to the absence of sufficient evidence to support its issuance. The findings of fact upon which the bankruptcy court based its decision to issue the Injunction Order must be affirmed unless clearly erroneous. Bankruptcy Rule 8013; *McFarland v. Farmers Production Credit Association*, 38 Bankr. 374 (N.D. Iowa 1984).

The Workers' chiefly point to an alleged lack of evidence to support the finding that New UNR could not survive post-confirmation asbestos-disease lawsuits without the Injunction. The Workers contend that the bankruptcy court's finding of irreparable harm without the Injunction was based on an inadequate record which consisted only of the testimony of only one witness

presented by UNR in support of the Injunction. UNR points out, however, that not only was this testimony undisputed at the time of the hearing, it was also corroborated by the entire record in the case, a record with which the Bankruptcy Judge was thoroughly familiar. Counsel for the Workers was present when UNR offered the testimony of its witness, Henry Grey, regarding the necessity of the Injunction. Although it was evident that Mr. Grey's opinion would provide the expert basis for the bankruptcy court's findings, Workers' counsel did not cross examine or otherwise object to Mr. Grey's testimony. In addition, our own review of other aspects of the record indicates an evidentiary basis for the bankruptcy court's specific findings contained in the Injunction Order. After reviewing the findings of the bankruptcy court, and the transcripts of proceedings before the Bankruptcy Judge, we find that the bankruptcy court was not clearly in error in concluding that a successful reorganization hinges on New UNR's ability to operate free from claims of persons who might not be creditors and whose claims might not otherwise be subject to the discharge provisions contained in Section 1141(d)(1)(A) and the correlative injunction contained in Section 524(a)(2) of the Bankruptcy Code.

III. MOOTNESS OF CONFIRMATION AND TRUST APPEALS

Both UNR and the Trustees have moved to dismiss the respective appeals in which they are involved on the grounds of mootness. In exercising our discretionary power to dismiss an appeal on mootness grounds, we must "scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole." *In re AOV Industries*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1148 (D.C. Cir. 1986); see also *In re Block Shim Development Co.*, 113 Bankr. 256 (N.D. Tex. 1990). Thus, although significant portions of post-confirmation transactions may be immune from review on mootness grounds, it is possible that relief may be afforded with

respect to certain claims that would not materially impact on the debtors reorganization. *Block Shim*, 113 Bankr. at 261-62.

Before considering the question of mootness with respect to specific issues in each appeal, we briefly take up the arguments raised by both UNR and the Trustees to the effect that we should afford great weight in our determination to the fact that the Workers delayed and then failed in seeking a stay of the Confirmation Order and never sought a stay of the Trust Orders. All of the parties dedicate substantial portions of their briefs discussing the significance of the Workers' alleged dilatoriness in seeking a stay as grounds for dismissal under the "equitable mootness" doctrine. See e.g., *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981). After reviewing the calendar of events in following entry of the Confirmation Order in June and early July, 1989, we find that the Workers pursued a stay of execution of the order with sufficient diligence to avoid the equitable mootness doctrine's form of estoppel. Furthermore, given the fact that the Workers ultimately failed to obtain a stay on the merits, any dilatoriness on their part in seeking a stay is largely irrelevant to any equitable determination against them with respect to bringing an appeal from the Confirmation Order—implementation of the Plan would have proceeded no matter how quickly the Workers sought a stay.

Regarding the Trust Orders, the situation is slightly different, but not so much as to present an equitable barrier to the Trust Appeal. The Workers' attempt and failure to obtain a stay of the Confirmation Order also included an attempt and failure to obtain a stay of the order originally approving and implementing the asbestos-claims trust. The dismissal of the appeal from the original trust as premature did not occur until November 3, 1989, several months after the request for stay had been denied. The Workers maintain that after the bankruptcy court finally approved the original trust and the amendments to the trust in

February, 1990, they did not repeat their request for a stay pending this second appeal since three courts already had denied their previous request. They acted on the belief that it "would have been a futile waste of legal and judicial resources to repeat the motion for a stay six months after the last Court had ruled too much had already occurred." Worker's Reply at 6. We find that assessment to have been made in good faith and to be well founded, although we observe that a request for a stay of only the Trust Orders might have received different treatment when presented on its own, out of the context of the earlier request for a stay as to the Injunction and Confirmation Orders which pertained more comprehensively to the reorganization as a whole, as opposed to only a relatively discrete aspect of the Plan.

We therefore shall focus our mootness inquiry as to both the Confirmation and Trust Appeals on the issue whether it is possible to grant effective relief to the Workers. In conducting this inquiry our goal is to pretermit "merits resolution only as to discrete aspects of the plan that have been so substantially consummated that effective relief is unavailable." Block Shim, 113 Bankr. at 258.

A. Confirmation Appeal

In favor of its motion to dismiss the Confirmation Appeal, UNR contends that the Plan has become so far implemented that we as a reviewing court can no longer grant any effective relief with respect to issues raised by the Workers as grounds for reversal of the Confirmation Order. Since the Confirmation Order was entered the Trust has been approved and the Plan has otherwise been implemented in several respects. Shareholder warrants and shares of New UNR common stock have been publicly traded. An interim distribution of New UNR stock to holders of allowed Class 4 claims has occurred. Class 1 priority claims have been paid and continue to be paid. UNR has acquired assets from third parties and granted liens to secure the purchase price of those

assets. Numerous entities have transacted business and extended credit in good faith and reliance upon implementation of the Plan and the resulting economic viability of New UNR.

To the extent the Workers seek to pursue their original goal of having the Confirmation Order reversed in its entirety and the estate liquidated under Chapter 7, the appeal is clearly moot by virtue of the many transactions which have already occurred. The Workers further maintain, however, that none of these transactions renders it impossible for us to reverse the Confirmation Order at least with respect to the specific points of error which they assert: 1) that future claimants should not have been permitted to share distributions with existing Class 5 creditors; 2) that all of the insurance proceeds meant for tort victims should have been allocated to the Trust for those injured instead of to UNR for working capital; or 3) that since they are former employees, the Workers have received unequal treatment by virtue of their claims being classified as Class 5 asbestos-disease claims as opposed to Class 2 workers' compensation claims.

In response, UNR contends that allowing any of the relief sought by the Workers would necessitate an entirely different reorganization plan. It maintains that such a change would have a substantial and detrimental effect on what has already transpired under the plan.[5] We agree that the Plan has been implemented to such a degree that it would be impossible to grant relief based on the first two issues without effecting the kind of substan-

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[5]UNR also posits that there is nothing in the law which gives this Court, or any other court, the power to fashion and impose a plan on the parties in a Chapter 11 case. UNR maintains that the power of this Court on appeal is limited to affirming or reversing the Confirmation Order. UNR misses the point, however, that the arguments raised by the Workers are points of error charging that the bankruptcy court lacked the authority to confirm a plan which contained the objectionable elements. UNR has cited to no applicable authority that would prohibit the bankruptcy court from modifying its Confirmation Order on remand.

tial and detrimental change that the mootness doctrine disallows. An alteration of the Plan's provisions for recovery by future claimants and the bar of suits by future claimants against New UNR would undermine the economic foundation upon which numerous innocent third parties relied in purchasing stock and transacting business with New UNR. Relief based on the second point of error would require diversion of all of the settlement proceeds to the Trust. That action would significantly reduce New UNR's stated level of capitalization, thereby additionally undermining the economic foundation upon which third parties have relied in transacting business with UNR, and effecting a major change in the value of the stock distributed under the Plan to the creditors and Asbestos-Disease Trust as the quid pro quo for the overwhelming approval of the Plan. Accordingly, we grant the motion to dismiss these challenges on mootness grounds.

As to the third challenge, involving the question whether the Workers claims have been improperly classified, UNR has failed to show, and we have found no basis for concluding that it would be impossible to grant relief to the Workers in the event the issue is resolved in their favor. *Cf. AOV*, 792 F.2d at 1150-54 (reaching issue of whether certain creditors had been improperly classified or received unequal treatment, notwithstanding mootness of other claims based on substantial implementation of a plan of reorganization). Before the Workers' challenge may be considered on its merits, however, we observe that the Workers' standing to assert this third ground for reversal is predicated on the assumption that the Workers in fact are classified only as Class 5 claimants and not as Class 2 claimants. As we have pointed out, there is considerable dispute among the parties as to this question and none of the parties has directed us to any place in the record where the bankruptcy court has expressly decided the issue. If the Workers are Class 2 claimants, entitled to payment of their claims in full, then they would appear to have nothing to complain about in this appeal. Therefore, we remand this issue to the bankruptcy

court for a determination of this issue in order to clarify whether the Workers possess standing or even need to make this challenge.[6]

B. Trust Appeal

According to the Workers, most of the issues they raise with respect to the Trust Appeal deal with how an asbestos claim is determined under the trust and claims procedures, which may be amended by the Trustees at any time. They maintain that effective relief can be granted by changing the Trust procedures to allocate funds differently among claimants and to reduce expenses. They assert that such changes would not materially affect the underlying stability of the reorganization. The Workers also contend that insofar as they are challenging procedures which govern the future conduct of the Trustees mootness plainly is not a consideration. *Block Shim*, 113 Bankr. at 262; *cf. also In re Johns Manville Bankruptcy*, 123 Bankr. 7, 1990 U.S. Dist. LEXIS 5976 (E.D.N.Y. and S.D. N.Y., May 15, 1990), 1990 U.S. Dist. LEXIS 7578 (E.D.N.Y. and S.D. N.Y., June 1, 1990), and various orders from July 9, 1990 through November 6, 1990 (orders imposing stays of payment and processing of asbestos claims and establishing a means for reviewing and potentially reorganizing the procedures of the Manville Trust).

In support of their argument that the Trust Appeal is moot, the Trustees have catalogued the actions which they have taken since the Trust Orders were entered.[7] See Trustees Mem. at pp.

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[6]This same threshold question of standing also would have precluded immediate consideration of the first two challenges on the merits, even if the challenges had not been rendered moot. The Workers' are affected by the allocation of the insurance proceeds and the sharing of Trust funds with future claimants only insofar as the Workers possess or might otherwise need to assert Class 5 claims.

[7]The Workers point out that many of these events actually occurred before the final order approving the Trust was entered. Workers Response at 14-15.

3-5. For the most part, these actions have been purely administrative in nature and relate to setting up the office, hiring staff, securing a line of credit for the Trust, and obtaining insurance. As far as we can discern, no payments have yet been made to any claimants under the Trust. The Trustees have failed to explain why the challenges would require the bulk of the actions they have taken to be undone, see Trustees Mem. at 9, or how the Workers challenges to the Trust procedures would materially impact on the reorganization. *AOV*, 792 F.2d at 1149 (holding that the resolution of the particular claim would "not affect the re-emergence of the debtor as are vitalized corporate entity"). Without further revelation concerning such propositions, we cannot accept the Trustees' assertion that "too much has happened for the eggs to be unscrambled." Id. at 8. Accordingly, we deny the motion to dismiss the Trust Appeal as moot.

Here again, however, before allowing the Workers to proceed on the merits of this appeal, we are concerned about the Workers' standing to challenge the Trust procedures, which rest on the same unresolved issue as to the proper classification of the Workers' claims under the Plan. Accordingly, the remand of this issue for consideration of the bankruptcy court applies to the Trust Appeal as well.

Conclusion

With respect to the Injunction Appeal, we find that the Workers lack standing to challenge the Injunction Order's prohibition of suits brought by Future Claimants. We dismiss as premature, the Workers' challenge regarding the scope of the Injunction's prohibition with respect to pursuit of workers' compensation remedies against entities other than UNR. We affirm the Injunction Order against the challenges that it was entered in violation of state criminal law and that it impermissibly enjoined suits against the Settling Insurers. We dismiss the challenge regarding the channelling of claims as improperly raised in the Injunction Appeal.

We dismiss the Confirmation Appeal as moot with respect to challenges to the Plan's provisions for Future Claimants and the allocation of the proceeds from the insurance settlements. Although we find that the classification challenge is not moot, we remand this issue to the bankruptcy court for a clarification as to whether the Workers possess Class 2 or Class 5 claims so that we may determine whether the Workers have standing to raise this challenge. In addition, we deny the Trustees' motion to dismiss the Trust Appeal as moot, but find that the Workers' standing to appeal from the Trust Orders also depends on how the Workers' claims are classified under the Plan, and therefore subject this appeal to the same order on remand. It is so ordered.

APPENDIX H

IN RE UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), DART, INC., JOBAL TUBE CO., INC., NATIONAL PLASTICS INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CORPORATION, Debtors.

In re UNR INDUSTRIES

Nos. 82 B 9841; 82 B 9851
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

29 Bankr. 741 March 25, 1983

HART, District Judge, MEMORANDUM OPINION AND ORDER

The Court has before it an Application ("Application") for the Appointment of a Legal Representative for Unknown Putative Asbestos-Related Claimants ("putative claimants") in the above-captioned cases. For the reasons given below, the Application is denied.

I. Facts and Positions of the Parties

On July 29, 1982, UNR Industries, Inc., and ten of its subsidiaries and affiliates ("the debtors") filed voluntary petitions for reorganizations under Chapter 11 of the Bankruptcy Code ("the Code"), 11 U.S.C. §§ 101 et seq. The cases have been consolidated for procedural purposes. The principal reason stated by the debtors for their filing the bankruptcy petitions is their involvement as defendants in some 17,000 asbestos-related personal injury lawsuits pending in various state and federal courts, exposing

them to potential liabilities, high damages, and substantial costs of legal services.

The plaintiffs in the asbestos suits are individuals who allege that they contracted diseases as a result of exposure to asbestos manufactured or supplied by the debtors. The diseases associated with such exposure are asbestosis, mesothelioma, and bronchogenic carcinoma. Latency periods for these diseases range from fifteen to forty years, and in some cases might be even longer.

Pursuant to an order of the Bankruptcy Court, the United States Trustee appointed two creditors' committees:

(1) a committee of lenders and suppliers;
(2) a committee of the plaintiffs or their representatives in the pending asbestos cases brought against the debtors.

On October 12, 1982, the debtors filed with the Bankruptcy Court the instant Application, and the Bankruptcy Court set a briefing schedule on the matter. On December 16, 1982, a General Order was adopted by this Court pursuant to which all cases under Title II were referred to the bankruptcy judges of this district. The General Order became effective on December 25, 1982.

On December 30, 1982, on motion of an interested party, the Application was withdrawn from the reference of this case to the Bankruptcy Court for consideration and ruling (order of Bua, J., sitting as emergency judge). This Court denied the debtors' motion to vacate the withdrawal of the reference as to the Application on January 7, 1983.

All interested parties have expressed their views on whether this Application should be granted or denied. The range of views covers the spectrum: some parties favor the Application and ask that a legal representative be appointed immediately; others believe the question is premature, and decision on the Application

should be delayed; others believe the Application should be denied immediately.[1] The Court will briefly outline the most significant positions asserted by the parties.

The Application requests the appointment of a legal representative to represent the interests of an unknown number of individuals who have in some way been exposed to asbestos (whether the exposure occurred within or without the workplace), who may in the future manifest an asbestos-related disease, and who may eventually claim money from the debtors for their injuries. The debtors contend that such a legal representative must be given the power to bind these putative claimants so that their claims can be discharged in these proceedings. Neither creditors' committee represents the interests of the putative claimants.

The debtors allege what will occur if the Court denies their Application: The 17,000 claims which already have been brought will be followed by between 30,000 and 120,000 more over the next forty years. No lenders will extend credit to companies burdened by litigation costs exceeding $1 million per month, with exposure to damages in the incalculable millions of dollars. If the putative claims cannot be dealt with in a reorganization, the debtors will have no choice but to liquidate. Whatever hope the putative claimants have to a future recovery would vanish, because by the time their diseases are discovered there will be no company left with any assets to satisfy a judgment.

The debtors suggest that it is premature to contemplate the precise authority and duties of the legal representative. All that

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[1]One Peter John Robinson claims to be a person who comes within the debtors' definition of putative claimants in that he was exposed to asbestos fibers and has not contracted any disease, though he may well do so in the future. On January 28, 1983, Robinson filed a motion to intervene in these proceedings in order to oppose the appointment of a legal representative. Robinson's position has been made known to the Court, and previously his motion to intervene has been entered and continued.

is necessary at this juncture, they say, is to appoint such a representative. The scope of the responsibilities will be fleshed out later on. They concede that the appointment of such a representative is a "novel concept" not expressly authorized by the Code, but state that this Court has the inherent equitable power to order the relief they seek so as to fulfill the Congressional intent of the Code: providing debtors with the opportunity for a "fresh start."

It is clear from the Application that the legal representative would be called upon to provide adequate representation of the interests of the putative claimants in at least these ways: —devise a form of notice to them; —aid in estimating or liquidating their claims; —participate in the negotiation of a plan of reorganization which will protect their interests and satisfy their claims.

The United States Trustee has stated that the Application raises more questions than it answers. The Trustee urges that because the debtors have failed to answer threshold questions, the Court should not rule on the Application at this time.[2] Instead, the Court should immediately appoint an amicus curiae to study and to advise the Court as to the numerous legal problems posed by the Application.

First, the Court notes that the Trustee substantially duplicates the function of an amicus curiae—an advisor of the Court without the responsibility to represent a particular interest. Second, the Court has had the benefit of the briefs of many leading members of the bar representing all sides of the question and does not believe that it should impose additional expense on an estate already burdened with high administrative costs. Further, the

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[2]The Court notes that on December 13, 1982, pursuant to order of the Bankruptcy Court, the United States Trustee appointed an examiner in these cases to ascertain the need for a study of the debtors' potential liability in all of their pending and future asbestos litigation. Such a study will enable all of the parties to attempt to estimate the debtors' exposure, a prerequisite to the development of a plan of reorganization.

Court finds that the questions raised by the Application are ripe for decision. Therefore the Court declines to appoint an amicus curiae.

The Application raises various statutory, practical, and constitutional problems. Despite the debtors' plea that these questions are premature and need not be addressed until after a legal representative is appointed, the Court finds that it would be a waste of judicial resources and the estate's financial resources as well were the Court not to address some of the obvious questions at this time.

II. The Code

The debtors agree that the Code by its terms does not provide for the appointment of a legal representative.[3] Instead, they refer to a well respected text which they say shows that the Court has power to grant the relief they seek.

> Where the Bankruptcy Code is silent, equitable principles will govern. But the equitable powers of the bankruptcy court will be exercised with the limits laid down by Title 11, and subject to and consistent with specific provisions contained in it.

1 *Collier on Bankruptcy,* P 3.01(5)(b)(ii) (15th ed. 1979). A bankruptcy court does not have unlimited equitable power to

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[3]The United States Trustee has suggested, as a possible alternative for consideration, that the Court appoint a guardian ad litem rather than a "legal representative." The Court does not doubt its power to appoint a guardian ad litem to represent "an infant or incompetent", Fed. R. Civ. P. 17(c), or even to represent unborn persons. *Hatch v. Riggs National Bank,* 124 U.S. App. D.C. 105,361 F.2d 559, 565-66 (D.C. Cir. 1966). However, as the debtors concede, "no person can serve as a guardian for another who is of full age and sui juris, since a court has neither the power nor duty to exercise a guardianship over an individual who is free and independent and is in full possession of his faculties. Furthermore, such an individual cannot make himself a ward of the court." Debtors' Reply Memorandum, at 6. Therefore the Court could not, within traditional equity doctrine, appoint a guardian ad litem to represent all unknown future claimants.

stray from the facts of any case and to enter any orders which might be described as equitable. The equitable power of this Court sitting in bankruptcy is limited by the statute adopted by Congress.

The debtors suggest that the putative claimants are creditors with claims which can be discharged in bankruptcy pursuant to 11 U.S.C. § 502. Two statutory definitions govern. A "creditor" is a person who "has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9) (emphasis added). A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . ." 11 U.S.C. § 101(4)(A) (emphasis added). The debtors contend that the putative claimants are holders of contingent claims. Three principles determine the question presented here:

1. A claim of which a bankruptcy court may take cognizance must be one that is recognized by state or federal law. *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 170, 91 L. Ed. 162, 67 S. Ct. 237 (1946) (Frankfurter, J., concurring). The asbestos claims and rights all arise under state law.

2. The existence of a claim turns on when it arose. *Matter of Thomas,* 12 B.R. 432 (Bkrtcy. S.D. Iowa 1981). In the case of a claim sounding in tort, it is not the wrongful or negligent act which gives rise to the claim. Instead, no claim arises until the plaintiff suffers an injury. *United States v. Reid,* 251 F.2d 691, 694 (5th Cir. 1958). W. Prosser, Law of Torts, 143-44 (4th Ed. 1971).

3. The claim of an asbestos plaintiff (including a putative claimant) does not arise under state law until the plaintiff knows or should have known about the injury. See, e.g., *Fusco v. Johns-Manville Products Corp.,* 643 F.2d 1181 (5th Cir. 1981); *Karjala v. Johns-Manville Products Corp.,* 523 F.2d 155 (8th Cir. 1975).

Therefore, under the definition imposed in the debtors' Application, the putative claimants—who have been exposed to asbestos some time in their lives but do not now have or do not know that they have an asbestos-related disease—have no claims under state law, and therefore do not have claims cognizable under the Code. Further, by the debtors' own definition the claims of the putative claimants will not have arisen either "at the time of or before the order for relief," 11 U.S.C. § 101(9), since a putative claimant is one who does not know that he has an asbestos-related disease.

The Code provision for the possibility of the evaluation and discharge of a contingent claim does not change the definition of "claim." It is not true that any conceivable claim is contingent. The contingency must be one that arises out of the prior contractual relationship of the claimant and the debtor. Cf. *In Re Gladding Corp.*, 20 B.R. 566, 568 (Bkrtcy. D. Mass. 1982) ("a mere possibility of a [tort] claim of unknown origin, in an unknown amount, and which only might arise, if at all, at some unknown time" is not cognizable in bankruptcy); *Matter of Noonan,* 17 B.R. 793, 795 n.3 (Bkrtcy. S.D.N.Y. 1982) (contingent contract right to recoup advance against royalties is dischargeable in bankruptcy); *In Re Labonte,* 13 B.R. 887, 891 (Bkrtcy. D. Kan. 1981) (guarantor of promissory note has contingent claim). A tort claim does not meet this requirement. Instead, a tort action brought against a debtor is covered by other definitions: it is a "right to payment . . . [not yet] reduced to judgment . . . [which is] unliquidated . . . [and] disputed . . ." 11 U.S.C. § 101(4)(A).[4]

[4]The legislative history of what became 11 U.S.C. § 101(9) states: "A guarantor of or surety for a claim against the debtor will also be a creditor, because he holds a contingent claim against the debtor that becomes fixed when he pays the creditor whose claims he has guaranteed or insured." Notes of Committee on Judiciary, S. Rep. No. 989, 1978 U.S. Code Cong. & Ad. News 5787, 5808 (emphasis added). See also Notes of Committee on the Judiciary, H.R. No. 595, 1978 U.S. Code Cong. & Ad. News 5963, 6267. This seems strong evidence that the term "contingent" was intended to apply to situations arising from

The debtors suggest the definition of "contingent claims" includes the future claims of the putative claimants. This position is untenable. If the debtors were correct, then any manufacturer of a potentially dangerous product would be able to file a petition under Title 11 followed by an application such as this, asking that a legal representative be appointed to protect the interests and negotiate a plan (including the discharge of all future claims) for those who some day might be injured by a product placed into the stream of commerce by the manufacturer—debtor. Bankruptcy courts would be forced to speculate as to the future dangerousness of and damages caused by any product which some day (after a discharge in bankruptcy) might be found to harm someone.

One court has found that a procedure which would require the filing of such a claim "would be absurd." *In Re Gladding Corp., 20 B.R. 566, 568* (Bkrtcy. D.Mass. 1982). A procedure which would allow for the filing and adjudication of such a claim would be equally improper as this Court has found no evidence that it was contemplated by Congress. n5 If one of these putative claimants—for example, the proposed intervenor in this action—were to file a proof of claim in this Court, such claim would be summarily disallowed and dismissed. Such a putative claimant

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(Footnote continued from previous page)
prior contractual relationships. The legislative history does say that "the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." S. Rep. No. 989, supra, at 5808; H.R. No. 595, supra, at 6266 (emphasis added). This does not change the fact that in order to be dealt with in bankruptcy, a legal obligation must exist. As demonstrated in the text, supra, the debtors have legal obligations only to those who know or should know that they have suffered injuries. By the debtors' definition, this excludes the putative claimants. In sum, the legislative history does not support the contention that the term "contingent" is intended to encompass a common law tort action which might arise in the future (but after a discharge in bankruptcy) at the time a person suffers actual injuries.

has no "right to payment." The fact that a so-called legal representative would instead appear to argue by proxy the putative claimant's cause does not create a claim where one did not before exist.

Therefore the Code, which even under the debtors' view limits the equitable powers of the Court, does not provide for the presentation of the kinds of claims at issue here. Appointing a legal representative to assert claims which are not cognizable under the statute would be fruitless and a waste of the assets of the estate.

III. Ability of Representative to Represent Putative Claimants

The debtors have rejected class action cases as precedent for any of the issues presented by their Application. The Court, however, believes it would be imprudent to consider this Application without considering the ramifications of such an order on this group of people. A class action is the legal construct which most closely resembles the issues presented here: under what circumstances can one person/representative speak for (and bind) large groups of individuals who are unable to speak for themselves?

Courts have been nearly uniformly reluctant to certify classes in mass tort actions. Common questions do not predominate in cases involving known injuries which allegedly were caused by the same defective product. See, e.g., *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (court refuses to certify, solely for determining questions of liability, class of 570 potential asbestos plaintiffs).

The court in Yandle noted some of the predictably conflicting legal and factual issues posed if a class were to be certified in the asbestos cases. The plaintiffs pressed a variety of legal theories, including negligence, failure to warn of the danger, failure to correct plant deficiencies, and liability for exemplary damages under state workers' compensation laws. The defendants

interposed numerous defenses; plaintiffs' different periods of exposure to asbestos fibers; different medical history of each plaintiff; whether a plaintiff was aware of the dangers of asbestos dust; whether a plaintiff had been given a mask or respirator, and whether such a safety mechanism was used. The case at bar adds additional complex and potentially conflicting issues: the different laws of the fifty states would govern the claims of the various putative claimants.

The Judicial Panel on Multi district Litigation addressed the very narrow issue of whether the asbestos cases litigated in various federal courts contained sufficient common questions to justify their transfer to one judicial district for the limited purpose of coordinating pretrial proceedings. The Panel found that it should not be done. *In Re Asbestos & Asbestos Insulation Material,* 431 F. Supp. 906 (Jud. Pan. Mult. Lit. 1977) (per curiam).

It seems clear that if the asbestos cases brought by people who are at present suffering from diseases cannot be consolidated for purposes of pretrial proceeding—a proposition far less complicated than appointing a class representative to appear for and bind those who are suffering from the disease—doing both for people who do not yet know they have any disease and may not experience any health problem for the next forty years would be a grave mistake. No individual could represent such a large group with conflicting positions on such various and complex issues, particularly where such a representative would by definition be unable even to ask his/her constituents what it is they want. It would be impossible for one legal representative to represent adequately the claims of tens of thousands of future claimants.

IV. Notice

The practical and legal problems of notifying those who the legal representative would be able to bind, were the Application granted, are insurmountable. All parties agree that a person may contract an asbestos-related disease in many ways. People who worked directly in installing asbestos insulation in, for example, Navy shipyards have contracted such diseases. Members of such workers' families who breathed asbestos fibers buried in the workers' clothing worn at home have been stricken. School children who were exposed to pipes and walls insulated by asbestos products may have contracted the disease. It is theoretically possible that someone who once walked by a shipyard where asbestos insulation was being installed may have inhaled asbestos fibers. All such people are included in the group of putative claimants, since asbestos-related diseases one day may become manifest in them.

In a case which seems to bear the closest resemblance to the problems at issue here—though the resemblance is not actually close, since the problems there were far more manageable—personal notice was required for injured persons to be bound by a judgment. See *Payton v. Abbott-Labs,* 83 F.R.D. 382 (D.Mass. 1979) (women who may manifest injuries in the future causally related to their mothers' having taken DES while the women were in utero must receive personal notice in order for judgment in class action to bind them; class membership confined to women born and domiciled in Massachusetts, who had been exposed in Massachusetts).

Last Term the Supreme Court decided that it would violate the due process clause of the Fourteenth Amendment for a tenant to be evicted from his or her apartment for non-payment of rent where the state statute required a notice of eviction to be posted to the apartment door. *Greene v. Lindsey,* 456 U.S. 444,102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). If tacking an eviction notice on

the door of the tenant's apartment does not provide sufficient notice to comport with due process, it is inconceivable that any notice short of personal notice to every person whom the debtors would seek to bind—and this could include, theoretically, every person in this country—would be acceptable under the principles of due process.

The debtors have not suggested what form of notice could possibly be devised to inform those whom the debtors hope to bind (though they make mention of "notice by publication or other means . . ." Debtors' Memorandum in Support, at 18). Their answer is that it is a premature issue: first appoint a legal representative, and then all the parties before the Court can work out the details of notice. But this Court, asked to employ its equitable powers, will not appoint a legal representative to invent a kind of notice when no conceivable form of notice has been suggested or can be imagined which will inform such future claimants.

Further, a plan of reorganization which would "bind" the putative claimants would be subject to constant attack over the years on due process grounds, as asbestos-related diseases manifest themselves in the "putative claimants" who never had the opportunity personally to participate in the proceedings or to "opt out" entirely. Such a result would increase expenses to the estate, make creditors feel insecure, and not accomplish the results sought.

V. Conclusion

Within the latitude given to it by statute, the Constitution, and the common law, a court may be creative in modifying and adjusting old remedies to suit new problems. But a court cannot rewrite or add to the applicable binding statute. The debtors would have the Court do that here. They argue, in effect, that the Congressional intention to provide the possibility of a "fresh start" to entities suffering under grave financial disabilities

includes the intention to subordinate to the "fresh start" concern the statutory and constitutional rights of those who do not yet know that they will in the future suffer from a dread disease. A "fresh start" for these debtors is not as important as this.

The Court is not unaware that in refusing to approve of a procedure by which the rights of the putative claimants would be adjudicated and cut off, the putative claimants may wind up with judgments against corporations left with only one asset: a corporate charter.

However, this is a Court of limited power. Congress has not given the judiciary authority to adjudicate the claims of future unknown claimants. The statute under which the Court labors does not contemplate the resolution of all problems faced by entities with substantial financial exposure, and does not provide for such a resolution here.

The Court is aware that there are proposals before Congress to create solutions for these problems, both for the companies and the present and future claimants. That is the place a solution must be found. There simply is no authority in the statute or the Constitution for this Court to grant the debtors the relief they seek.

THEREFORE IT IS ORDERED that

(1) The debtors' Application is denied.

(2) The motion of Peter John Robinson for leave to intervene is denied.

APPENDIX I

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC., (Alabama), UNR-ROHN, INC., (Indiana), DART, INC., JOBAL TUBE CO., INC., NATIONAL PLASTICS, INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CORPORATION, Debtors.

In re UNR INDUSTRIES

Nos. 82 B 9841-9851

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

46 Bankr. 671; February 28, 1985

TOLES, Bankruptcy Judge, MEMORANDUM OPINION AND ORDER

This cause coming on to be heard upon the Motion to Reconsider Debtors' Application for Appointment Of A Legal Representative For Unknown Putative Asbestos-Related Claimants filed by the above-entitled Debtors, represented by SCHWARTZ, COOPER, KOLB & GAYNOR, CHTD., and upon the responses thereto filed by the OFFICIAL COMMITTEE OF ASBESTOS-RELATED PLAINTIFFS, represented by DEFREES & FISKE, and by N.V.W. (USA), INC., represented by BELL, BOYD & LLOYD, and the Court, having reviewed the record in these cases and having examined the memoranda of law filed by the parties in support of their respective positions, and having afforded the parties an opportunity for hearing and being fully advised in the premises:

The Court Finds:

1. On July 29, 1982, the above-entitled Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Since that date, Debtors have continued to operate their businesses and manage their properties as debtors-in-possession.

2. Prior to 1970, some of the above Debtors or their predecessor corporate entities were involved in the manufacture and sale of products containing asbestos fiber. Exposure to these products has been implicated as a cause of several forms of serious and debilitating asbestos-related disease. These asbestos-related diseases often manifest themselves after long latency periods following the victims' original exposure to asbestos fiber. Although Debtors ceased their dealings with asbestos products in the early 1970's, there were approximately 17,000 asbestos-related tort or wrongful death cases pending against them on July 29, 1982, when these bankruptcy proceedings commenced. In addition, Debtors anticipate that between 30,000 and 120,000 new asbestos-related tort and wrongful death cases may be filed against them between now and the early twenty-first century, as individuals who have already been exposed to asbestos or asbestos products begin to manifest disease symptoms.

3. The expense involved in defending the 17,000 asbestos-related tort and wrongful death suits pending against Debtors on July 29, 1982, had much to do with Debtors' institution and maintenance of these bankruptcy proceedings. The disposition of Debtors' potential liability to the 30,000 to 120,000 people who may contract asbestos disease through the early part of the next century could have a decisive impact on Debtors' ability to successfully reorganize.

4. The liquidation of the Debtors, or the failure of Debtors to make provision for its potential liability to these 30,000 to 120,000 putative asbestos disease victims in a plan or plans of reorganization, might leave these parties without private remedy with which they, or their estates, could obtain recovery from these Debtors for their personal injuries or their wrongful death.

5. On October 19, 1982, Debtors filed in this Court an Application For Appointment Of A Legal Representative For Unknown Putative Asbestos-Related Claimants [the Application]. The purpose of this Application was to secure the appointment of an individual to represent the interests of people who had been exposed to raw asbestos or asbestos product mined, manufactured or sold by Debtors, who had

not yet manifested symptoms of asbestos disease. The specific function of this representative would be (1) to assist Debtors devise a form notice of these proceedings to be sent to the presently unknown putative asbestos disease victims; (2) to estimate or liquidate the alleged claims of such potential asbestos disease victims; and (3) to negotiate a plan or plans of reorganization with respect to the interests of these potential asbestos disease victims.

6. On December 29, 1982, the United States District Court for the Northern District of Illinois, Eastern Division, acting pursuant to the motion of a party in interest, withdrew the reference of subject matter jurisdiction respecting Debtors' Application from this Court. On March 25, 1983, the United States District Court entered its Memorandum Opinion and Order, denying Debtors' Application. *In re UNR Industries, Inc.,* 29 Bankr. 741 (N.D. Ill. 1983).

7. Debtors sought leave to appeal from the district court's March 25, 1983, Order. On January 17, 1984, the United States Court of Appeals for the Seventh Circuit Denied Debtors' application for leave to appeal. *In re UNR Industries, Inc.,* 725 F.2d 1111 (7th Cir. 1984). However, in the course of its Opinion, the Court of Appeals made certain observations which are of particular relevance to the matter now before the Court. The Seventh Circuit suggested that people who have unmanifested cases of asbestos disease to whom Debtors are potentially liable, might now be entitled to file a proof of claim against Debtors' estates. 725 F.2d at 1118-19.

The Seventh Circuit further suggested that even if such unmanifested asbestos disease victims do not presently possess a "claim" against these estates, within the meaning of section 101(4)(A) of title 11 of the United States Code, the equitable power of the bankruptcy court "just might be broad enough to enable the court to make provision for future asbestosis claims against [Debtors] when it approved the final plan of reorganization." 725 F.2d at 1119.

The Seventh Circuit offered no opinion respecting whether the interests of victims of unmanifested asbestos disease could be represented in these proceedings in a manner anal-

ogous to a class action. The determination of this and other questions relating to the legal status of these putative asbestos disease claimants, in the opinion of the Seventh Circuit, court better be decided once one or more such victims actually file a proof of claim in these proceedings, and request, on his own behalf, or on behalf of those who are similarly situated, the entry of the relief requested in the Application now before this Court. 725 F.2d at 1118.

8. Thirteen months have passed since the Court of Appeals entered its decision in this matter, and 31 months have passed since these bankruptcy cases commenced. No party claiming to be a victim of unmanifested asbestos disease has moved this Court for entry of an order appointing a legal representative or a committee to represent his or her interests, or the interests of those who may be similarly situated.

9. On May 18, 1984, Debtors filed a Motion to Reconsider before the United States District Court for the Northern District of Illinois, Eastern Division, requesting that Court to reexamine its March 25, 1983, ruling with reference to the legal representative issue.

10. On June 13, 1984, the district court entered an Order which provided: The matter of the application of the debtor for reconsideration of the appointment of a legal representative is referred to the United States Bankruptcy Court for the Northern District of Illinois. As stated by the United States Court of Appeals for the Seventh Circuit, the order entered by this Court, *In Re UNR,* 29 Bankr. 741 (N.D. Ill. 1983), was interlocutory and is open for reconsideration. *In the Matter of UNR Industries,* 725 F.2d 1111 (7th Cir.1984). The Court concludes that the Bankruptcy Court should be free to consider the matter in its discretion in light of the prior decisions and any circumstances which in its judgment warrant such reconsideration.

11. On June 21, 1984, this Court entered an Order granting interested parties leave to file memoranda of law respecting the legal representative Application. Memoranda were filed by Debtors, N.V.W. (USA), Inc. and by the Official Committee of Asbestos-Related Plaintiffs. The matter was then taken under advisement on these briefs.

The Court Concludes and Further Finds:

1. The Committee first suggests that from a procedural and a policy standpoint, a bankruptcy judge ought not reconsider an Order which has been entered by the United States District Court. However, the bankruptcy court is a unit of the district court. 28 U.S.C. § 151. The Court has jurisdiction to determine the matter now before it.

2. The Committee then asserts that this Court is bound by the prior decision of the United States District Court with reference to the legal representative question. However, the United States District Court referred Debtors' motion to reconsider its prior decision on the legal representative issue to this Court for adjudication, "in light of the prior decisions and any circumstances which in its judgment warrant such reconsideration." Debtors' Application for the appointment of a legal representative shall be reconsidered, in accordance with this instruction.

3. On the merits, the Committee suggests that putative asbestos disease victims are capable of representing themselves in these proceedings, and that there is no need for the Court to appoint a legal representative with reference to them. In a separate portion of its Memorandum, the Committee also reasserts its original contention, as presented to the district court, that these victims are not "creditors" of these estates and therefore are not entitled to any representation in these proceedings.

The Seventh Circuit has observed that the entitlement of the putative asbestos disease victims to file proofs of claim in these proceedings, is an "open" question. These victims might be creditors of these estates, and they might be entitled to assert claims against Debtors, as those terms are defined by sections 101(4)(A) and 101(9)(A) of the Bankruptcy Code. There may be questions, which this Opinion will leave unresolved, with reference to the subject matter jurisdiction of this Court over the interests of these victims. But this Court does possess jurisdiction over the Debtors, and might also possess equitable authority to require Debtors to make provision for these victims in their plan or plans of reorganization. *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th

Cir. 1984). The Court concludes that the controversy regarding the legal status of the putative asbestos disease victims as "claimants" of these estates should not bar the appointment of a legal representative with reference to them.

4. Next, the Committee suggests that putative asbestos disease victims are not "parties in interest" in these proceedings, as that term is defined by section 1109(b) of the Bankruptcy Code. The Committee urges the Court to decline to follow the decision of the United States Bankruptcy Court for the Southern District of New York, which held that putative asbestos disease victims toward whom the debtor Johns-Manville companies might be liable, were parties in interest in that chapter 11 bankruptcy proceeding. *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D.N.Y.), Leave to appeal granted, (S.D.N.Y. December 7, 1984).

This Court is in accord with the determination reached in the Johns-Manville case, that putative asbestos disease victims are parties in interest who are entitled to be heard in the chapter 11 bankruptcy case of their alleged tortfeasor. 36 Bankr. 743, 757. Putative asbestos disease victims have a stake in the outcome of these proceedings, which entitles them to party-in-interest status.

On October 23, 1984, the Official Committee of Unsecured Creditors, represented by WINSTON & STRAWN, filed a motion to convert the chapter 11 case of Debtor UNR Industries, Inc. (Debtors' parent corporation) to a case under chapter 7 of the Bankruptcy Code. Without predicting the outcome of this litigation, the Court observes that the resolution of this conversion motion would have far-reaching effects on the interests of Debtors, its creditors, and its equity security holders. The motion, if allowed, might extinguish any effective private remedy which victims of unmanifested asbestos disease, or their estates, might assert against the Debtors. These victims, in equity, should be heard on the motion to convert, and the provisions of the Bankruptcy Code are flexible enough to permit this Court to provide these victims with a means to be heard. Section 1109(b) of the Bankruptcy Code is not restrictive is its enumeration of the parties who may be recognized as parties in interest in a

chapter 11 bankruptcy proceeding. See 5 L. King, Collier on Bankruptcy P 1109.02[3] (15th ed. 1984). Under all the unique circumstances of this case,the Court holds that putative asbestos disease victims toward whom Debtors maybe liable are parties in interest in these proceedings.

5. The Committee further suggests that the Bankruptcy Reform Act of 1978 was not designed to address the complex problems posed by mass toxic tort disasters, such as Debtors' current difficulty with its potential asbestos-related tort liability. The Committee urges the Court to exercise judicial restraint with reference to the legal representative question, and refrain from fashioning a remedy through its equitable power, which is not specifically provided for in the Bankruptcy Code.

This Court is charged with the responsibility of applying the Bankruptcy Code under which Debtors are attempting to reorganize, while endeavoring to insure that parties in interest receive fair and equitable treatment of their claims and interests. The equity power of the Court, which derives from section 105(a)of the Bankruptcy Code, permits this Court to afford fair and equitable treatment to parties "in countless situations in which the [bankruptcy] judge is required to deal with particular, individualized problems." See *Butner v. United States,* 440 U.S. 48, 55-56, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). In this unique case, with its unique circumstances, it is necessary for the Court to exercise its equitable authority to fashion some kind of procedural relief for these putative asbestos disease victims.

6. Thirteen months have passed since the Seventh Circuit issued its opinion with reference to this matter, and putative asbestos disease victims are not representing themselves in these proceedings. Their interests herein are not adequately represented by the Debtors or by the official committees of unsecured creditors. The litigation in these cases has reached an advanced stage, particularly in reference to the pending motion to convert filed against Debtor UNR Industries, Inc. These circumstances warrant the appointment of a Legal Representative for these putative victims of asbestos disease, who can work toward the involvement of these putative vic-

tims in these proceedings, and who can act as amicus curiae regarding matters of vital and immediate importance to these people.

7. The primary task of this Legal Representative will be to advise putative asbestos disease victims of the pendency of and their interest in these bankruptcy proceedings. The Legal Representative may also be heard with reference to any plan or plans of reorganization proposed by Debtors or other interested parties, and may also be heard respecting any motion to convert filed by or against the above Debtors. The Legal Representative shall seek leave of Court prior to becoming involved in any other litigation within this cause. Within the restrictions noted above, the Legal Representative shall exercise the powers and responsibilities of an official creditors' committee as set forth in section 1103 of the Bankruptcy Code. 11 U.S.C. §§ 1103.

8. The United States Trustee is granted leave to suggest a disinterested party to serve as Legal Representative for putative asbestos disease victims, within 20 days of the effective date of this Order. The Court shall rule upon the qualification of the candidate selected by the United States Trustee, after notice and hearing. Should the United States Trustee decline to suggest a candidate for this position the Court, after notice and hearing, shall entertain the suggestions of parties in interest on this matter, and shall rule on these suggestions after notice and hearing.

9. The Committee suggests that no representative could "hope to represent the diverse interests of this enormous group of people" who may be described as putative asbestos disease victims, and whose legal status might depend upon "the tort law of perhaps more than fifty jurisdictions." The Committee further suggests that Debtors ought not be permitted to impose their concept of proper representation on persons who are capable for representing themselves in this litigation. However, the task of the Legal Representative, as contemplated by the Court, is not as comprehensive as that requested by the above Debtors.

The determination of whether putative asbestos disease victims are creditors of these estates, or whether their inter-

ests could be represented in these proceedings in a manner analogous to a class action, or whether these parties would be entitled to vote on a plan of reorganization, or whether their claims might be discharged in this bankruptcy proceeding, are all questions which can properly be addressed after putative asbestos disease victims commence actual participation in these cases. *In re UNR Industries, Inc.*, 725 F.2d 1111, 1118 (7th Cir. 1984). The Court's Order today is intended only to remove an economic barrier which might have hindered the involvement of putative asbestos disease victims in these cases, and to give these victims some voice regarding the ultimate fate of these Debtors which they currently do not possess. Recent case authority supports the entry of the relief set forth in this Order. *In re Amatex Corp.*, 83-1843 and 83-1868 (3d Cir. Feb. 22, 1985).

The Order does not create or abrogate the substantive rights of any party. Once putative asbestos disease victims become involved in these proceedings, nothing in today's Opinion would preclude them from seeking the appointment of an official committee to represent their interests. The Objections of the Official Creditors' Committee of Asbestos-Related Plaintiffs to the instant Application are overruled.

10. The Court predicated its action with reference to the appointment of a Legal Representative on sections 105(a), 1102(a)(2), 1109(b), 1128(b) and 1129(a) of title 11 of the United States Code. 11 U.S.C. §§ 105(a); 1102(a)(2); 1109(b); 1128(b); 1129(a).

11. This cause constitutes a core proceeding as defined by section 157 of title 28 of the United States Code.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Application of the above-entitled Debtors for the Appointment of a Legal Representative For Unknown Putative Asbestos-Related Claimants be, and the same is hereby allowed, subject to the restrictions on the scope of the responsibilities and authority of such Legal Representative set forth in this Memorandum Opinion and Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Objections filed by the OFFICIAL COMMITTEE OF ASBESTOS-RELATED PLAINTIFFS to Debtors' Application for the Appointment of a Legal Representative For Unknown Putative Asbestos-Related Claimants be, and the same are hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the UNITED STATES TRUSTEE be, and the same is hereby granted 20 days' leave to suggest to the Court a disinterested party to serve as a Legal Representative for unknown putative asbestos disease victims, to be approved by the Court after notice and hearing, and that failing such action by the UNITED STATES TRUSTEE within the above-specified period, parties in interest may move the appointment of a disinterested party to serve as Legal Representative, which the Court shall rule upon after notice and hearing.

Edward B. Toles, United States Bankruptcy Judge

APPENDIX J

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

IN RE: UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., *Debtors.*	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851 Judge David H. Coar

CONFIRMATION ORDER

At Chicago, Illinois, in
said District and Division
June 1, 1989

The Plan Of Reorganization Dated March 14, 1989 (the "Plan") under Chapter 11 of the Bankruptcy Code having been filed herein on March 15, 1989 by UNR Industries, Inc., Unarco Industries, Inc., UNR, Inc., UNR-ROHN, Inc. (Alabama), UNR-ROHN, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc., and Folding Carrier Corp. (hereinafter referred to collectively as the "Debtors"); and the Disclosure Statement with respect to the Plan having been approved as containing adequate information pursuant to an order dated March 22, 1989; the Court having conducted an evidentiary hearing on confirmation of the Plan upon notice to creditors and other parties in interest; the Court having heard the testimony of the Debtors' witnesses and considered all other evidence adduced by the Debtors in

support of the Plan; the Court having considered the statements of counsel for the Debtors, the Official Unsecured Creditors' Committee, the Official Committee of Asbestos-Related Plaintiffs, the Legal Representative for Unknown Putative Asbestos-Related Claimants and the Examiner in support of the Plan; Capitalized terms used in this order shall have the meanings attributed to them in the Plan, a copy of which is attached and made a part of this order.

NOW, THEREFORE, THE COURT FINDS AS FOLLOWS:

1. The Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law.

2. The Plan complies and the Debtors, its proponents, have complied with the provisions of Chapter 11 of the Code.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. Each holder of a claim or interest will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Code on such date.

5. All payments made or promised by the Debtors, or by any other person issuing securities or acquiring property under the Plan, or by any other person for services or for costs and expenses in or in connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court.

6. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees of the Debtors after confirmation of the Plan have been fully disclosed and the appointment of such persons to, or their continuance in, their respective offices, is consistent with the

interests of the creditors and equity security holders and with public policy.

7. Upon the Effective Date of the Plan, the Board of Directors of New UNR shall consist of the following individuals, who shall serve until their successors shall have been selected and such successors shall have qualified: John F. Foran, R.J.J. Hiemstra, Jr., William S. Leavitt, Dwight Rohn and Basil Vasiliou.

8. The identity of any insider that will be employed or retained by the Debtors after confirmation of the Plan, and the nature of such persons' compensation, have been fully disclosed.

9. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors or any successor to the Debtors under the Plan.

10. All of the conditions precedent to confirmation of the Plan prescribed in Article IV Paragraph E of the Plan have been satisfied.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Plan of Reorganization Dated March 14, 1989 filed by the Debtors on March 15, 1989, a copy of which Plan is attached hereto, be and is hereby confirmed;

2. Any officer of a Debtor or New UNR be and is hereby authorized to take any and all actions necessary to effectuate the Plan, including, without limitation, amending the charter of any one or more of the Debtor companies in which such individual holds office.

ENTER: /s/ David H. Coar

Bankruptcy Judge

Excerpts From Exhibit A

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., *Debtors.*	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851 Judge David H. Coar

CONSOLIDATED PLAN OF REORGANIZATION DATED MARCH 14, 1989

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., AND FOLDING CARRIER CORP., debtors and debtors-in-possession (the "Debtors"), purpose the following Consolidated Plan of Reorganization:

DEFINITIONS

The definitions and rules of construction set forth in the Code and Bankruptcy Rules shall apply when the words and phrases defined and construed therein are used in this Plan. The following terms, when used in this Plan, shall, unless the context otherwise requires, supplement the foregoing definitions and rules of construction and have the following meanings, respectively:

Allowed Amount: That amount in which a claim is allowed pursuant to § 502 of the Code or by final order of the Court.

Asbestos-Disease Claims: All alleged liabilities or obligations (under any theory of law, equity or admiralty) for death, personal injury, personal damages or punitive damages (whether physical, emotional or otherwise), whether or not included in the definition of "claim" in § 101(4) of the Code, arising out of exposure to asbestos, and arising from acts or omissions by one or more of the Debtors or the Debtors' predecessors in interest prior to the Effective Date, regardless of when the sickness, injury or disease which gives rise to such liability or obligation, becomes or will become manifest, including, without limitation, all warranty, guarantee, indemnification or contribution liabilities or obligations of any of the Debtors to any other Entity to the extent that such warranties, guarantees, indemnifications or contribution responsibilities to such Entity-cover claims against such Entity that would, if such claims had been made directly against any of the Debtors, constitute Asbestos-Disease Claims.

Asbestos-Property Claims:	All claims, other than Asbestos-Disease Claims, against one or more of the Debtors for damages arising from products containing asbestos.
Cases:	The reorganization cases under Chapter 11 of the Code of the Debtors.
Code:	United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq.
Confirmation Order:	The order of the Court which confirm the Plan.
Court:	The United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, presiding in these Cases, or any other court exercising jurisdiction over these Cases.
Creditor Stock:	42,404,847 shares of the common stock of New UNR (representing 92% of the shares of New UNR) to be issued and outstanding as soon as practicable after the Effective Date, or the proceeds thereof.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	In Proceedings for Reorganization Under Chapter 11 of the Bankruptcy Code
UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC., (Alabama), UNR-ROHN, INC., (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP.,	Nos. 82 B 9841-9845 82 B 9847 82 B 9849 and 82 B 9851
Debtors.	Hon. David H. Coar

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF INJUNCTION

This cause comes on to be heard, pursuant to Order and Notice of this Court dated March 22, 1989 scheduling May 31, 1989, at 11:00 A.M. for a hearing, *inter alia*, on the injunction (the "Injunction") described in Article IV, Paragraph E2 of the Consolidated Plan of Reorganization dated March 14, 1989, filed by the Debtors (the "Plan") (as used herein, all terms which are capitalized, but not otherwise defined, have the meaning set forth in the Plan);

It appearing to the Court and the Court specifically finding:

A. That the pendency of this case has been widely publicized through an extensive national media campaign, encompassing television, radio, newspapers and magazines, focusing upon markets where asbestos workers are likely to reside;

B. More than 130,000 people identified themselves to Debtors as persons who might have Asbestos-Disease Claims against the Debtors;

C. A copy of said order and notice of March 22, 1989 (the "Order and Notice", attached hereto as Exhibit A) was mailed to each creditor and party in interest, including those persons referred to in paragraph 2 above;

D. A copy of a Notice (attached hereto as Exhibit B) was published extensively throughout the country, reaching in excess of 98 million persons;

E. Such dissemination of the Order and Notice and the Notice constitutes the best notice possible under the circumstances of this case to those who might be affected by the Injunction and effectively afforded an opportunity to object and be heard to those who might be affected by the Injunction;

F. Moreover, the Court has examined the provisions of the Plan with respect to the treatment of Asbestos-Disease Claims, including the claims of persons who have not yet manifested an asbestos-related disease ("future claimants") and has determined that the Plan makes adequate provision for those claims.

The Court having considered the evidence adduced in support of the Injunction, the record in this case, the legal authority and being fully advised in the premises;

NOW, THEREFORE, THE COURT FURTHER FINDS AS FOLLOWS:

1. In the absence of the Injunction, the reorganized Debtor, New UNR, might face limitless litigation for Asbestos-Disease Claims.

2. Adequate provision has been made pursuant to the Plan for the treatment of Asbestos-Disease Claims.

3. The threat of such litigation would preclude New UNR from receiving an unqualified opinion from a certified public accounting firm concerning its financial condition.

4. The market for the Creditor Stock, the Shareholder Stock and the Shareholder Warrants would be substantially and adversely affected by the threat of such litigation.

5. In the absence of the Injunction, New UNR would be unable to conduct or continue in its business.

6. While New UNR would be irreparably harmed in absence of the Injunction, Asbestos-Disease Claimants, who would be enjoined, will have the right to pursue their claims against the UNR Asbestos-Disease Claims Trust established pursuant to the Plan.

7. Absent a successful reorganization, Debtors' assets would be liquidated and distributed only to existing creditors pursuant to Chapter 7 of the Bankruptcy Code. Under these circumstances, post-confirmation claimants would have rights, if any, only against corporate shells.

8. The Injunction is in the public interest. It facilitates the Debtors' reorganization process consistent with Congress' intent in establishing Chapter 11 of the Bankruptcy Code. In so doing, productive assets are redeployed in such a way as to maximize benefits to creditors and to preserve employment and other economic benefits inuring to the communities where the assets are located.

9. Debtors are likely to successfully reorganize if the Injunction is granted.

THE COURT FURTHER FINDS AND CONCLUDES:

10. The court has the statutory, constitutional and inherent authority and power to enter the Injunction. Statutory authority arises, in part, from Section 105 of the Bankruptcy Code, 11 U.S.C. § 105. *Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bkrtcy. S.D.N.Y. 1986), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987). The Court invokes, as an alternate and independent basis for the issuance of the Injunction, its inherent equitable powers to issue injunctions in aid of its jurisdiction and to enforce its orders. *Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U.S. 648 (1935). Moreover Bankruptcy Courts have issued injunctions under the authority of the All Writs Act, 28 U.S.C. § 1651. *In re Baldwin United-Corp. (Single Premium Deferred Annuity Litigation)*, 770 F.2d 348, 342 (2d Cir. 1985).

11. In determining whether an injunction is appropriate, the Court has considered, among other factors, the traditional four elements for the issuance of an injunction, namely, the movant's likelihood of success on the merits, the lack of an adequate remedy at law, the balance of hardships and the public interest. *E.g., A.H. Robins Co. v. Piccinin* (*In re A.H. Robins Co.*), 788 F.2d 994, 1008 (4th Cir. 1986).

12. The Court has the power to issue an injunction whenever it deems it necessary to aid the rehabilitative process. *See, e.g., Manville Corp. v. Equity Security Holders Committee* (*In re Johns-Manville, Inc.*), 801 F.2d 60, 69 (2d Cir. 1986).

13. An injunction may properly be entered in aid of a plan of reorganization where, in its absence, the rights of the intended beneficiaries would be impaired and piecemeal dismemberment of the debtor's estate would result in its absence. *In re A.H. Robins, Co.*, 88 B.R. 742 (E.D. Va. 1988); *Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bkrtcy. S.D.N.Y., 1986), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987).

14. In addition to meeting the traditional standards for an injunction under the four-part test set forth above, Debtors have established that the Injunction is necessary to support the Court's authority to implement the rehabilitative aspects of the Plan.

15. Establishment of the UNR Asbestos-Disease Claims Trust is a proper means of channeling claims. It is appropriate for the Court to enter the Injunction to limit prosecution of all Asbestos-Disease Claims and to direct such claims instead to the UNR Asbestos-Disease Claims Trust. *Matter of Johns-Manville Corp.*, 68 B.R. 618, 625 (Bkrtcy. S.D.N.Y. 1986); see *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986); *In re Davis*, 730 F.2d 176 (5th Cir. 1984).

16. Due process is fully preserved. No property rights are impaired. Rather, federal law imposes a limitation or channeling of the direction for resolution of such claims, if any, as might be recognized under state law in the future. This is well within the power and rights of bankruptcy jurisdiction. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946).

17. Due process has been satisfied for those persons who may have constitutionally protected rights for a number of reasons including the fact that the notice provided by the Debtors was reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of these reorganization proceedings and of Debtors' request for an Injunction incident thereto so as to afford them a reasonable time to make their appearance and to make their objections, if any, thereto (*Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950)); that the interest of Asbestos-Disease Claimants, including those who have not yet manifested an asbestos-related disease have been represented in these proceedings through the Official Committee of Asbestos-Related Plaintiffs ("Plaintiffs Committee") and the Legal Representative; that the constituency of the Plaintiffs Committee, claimants who are similarly situated to future claimants, have voted overwhelmingly in favor of the Plan; and that the Court has independently determined that the Plan makes adequate provision for all Asbestos-Disease Claimants, including future claimants.

18. This is a core proceeding pursuant to Section 28 U.S.C. § 157(a).

For the foregoing reasons, it is hereby ordered that:

All Entities are permanently restrained and enjoined from taking any action whatsoever for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claims, Interests, Asbestos-Disease Claims or Asbestos-Property Claims (other than actions brought to enforce any right or obligation under the Plan, which action shall be in conformity with and compliance with the provisions of the Plan) against the Debtors, any Property of the Estates of the Debtors, any of the Debtors' Affiliates, New UNR, any of its property, any of its Affiliates and any of the insurance carriers or brokers in the Insurance Litigations including, without limitation, Bituminous Casualty Corporation, Allstate Insurance Company, Continental Insurance Company, Zurich Insurance Company, Home Insur-

ance Company, First State Insurance Company, Underwriters Adjusting Company and Northbrook Excess and Surplus Insurance Company (collectively the "Settling Insurers"), provided that such insurance carrier shall have entered into a settlement agreement with one or more of the Debtors or New UNR. This Injunction shall be construed as broadly as the law and the English language permit and shall be deemed to be a part of the order confirming the Plan for purposes of the settlement agreement heretofore entered into between the Debtors and the Settling Insurers.

It is further Ordered that this Court reserves jurisdiction, to the fullest extent permitted by law, for purposes of enforcing this Injunction, without prejudice to any other purpose for which this Court has reserved jurisdiction pursuant to any other order.

Enter:

/s/ DAVID H. COAR

Bankruptcy Judge Jun 1—1989

APPENDIX L

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., and FOLDING CARRIER CORP., *Debtors.*	In Proceedings for a Reorganization Under Chapter 11 of the Bankruptcy Code Nos. 82 B 9841-9845, 82 B 9847 82 B 9849 and 82 B 9851 Judge David H. Coar

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR
June 1, 1989

* * *

THE COURT: There is no question, and it is consistent with the broad policy of the Bankruptcy Code that all victims of pre-petition conduct by a debtor participate rateably, that is pro rata, by class.

But if we try to include these, for lack of a better term, "future claimants," how do we resolve these other legal questions? That was the problem facing the parties in the case. That was among the problems facing the parties in this case, and principally, Mr. Forde.

There is no question, and the 7th Circuit has commented, that from the debtor's point of view, having these parties designated as creditors, as claimants, would best meet the objectives of the

debtor, because then the question as to liability for asbestos-related claims would be put to an end. Without that, the plan is confirmed as to those people who have claims, those people who have manifested symptoms, as to those people who have not manifested symptoms the next day or the next week or next year or 10 years from now who will assert claims against a reorganized company.

There is even the potential that if the debtors, if the organized company was sought to be sold, that they would either not be able to sell the company, or the price would be low because of this potential for transferee liability that's been addressed in the testimony. That was a problem.

Now, it is not at all clear to me that despite Judge Hart's expression of opinion to the contrary that these parties are not claimants within the context of the Bankruptcy Code, the plan seeks to avoid a determination of that by allowing these, again for lack of a better term, "future claimants," that is, those parties who have been exposed to UNR asbestos fibers but who have not yet manifested symptoms, to participate in the assets of the debtor, that is, the assets from the date of confirmation.

Moreover, if the debtor is reorganized, both the future claimants and existing claimants will participate in future earnings of the debtor, an ability that they would not have if this case were converted to a Chapter 7.

I think that the compromise, the attempted compromise sought to be achieved by these parties is fair. I think it's in the best interest of all creditors, and I think is true without a determination as to whether or not the future claimants are claimants within the meaning of the Bankruptcy Code. But to the extent that their participation requires a determination that they are claimants as an alternative ground, this Court also determines that they are claimants within the meaning of the Bankruptcy Code.

MR. GAYNOR: Your Honor has been using the term claimants, and I'll suggest perhaps creditors.

THE COURT: I'm using the terms interchangeably.

Now, with respect to the question on the injunction as to whether or not this plan is proposed by a means prohibited by law, the injunction, for the reasons that I just stated, I think that there is no constitutional impediment to the injunction reaching those parties who have been exposed but who have not manifested symptoms.

With respect to those claimants/creditors and to the extent of those parties who may not yet have been exposed to UNR asbestos but who will in the future and who will manifest symptoms in the future, again, I think that there is under the Bankruptcy Court's equitable powers under Section 105, sufficient authority to channel those claims to the assets, and to that extent this Court does have jurisdiction consistent with the constitution to issue the injunction with respect to those parties.

The other requirements of Section 1129 have not been put in issue to the extent that the debtor has a burden to establish those requirements. The Court determines that burden has been met.

I'll sign either the confirmation order and the findings of fact and conclusions of law submitted or some variation thereof which will incorporate those findings. But my comments this afternoon shall constitute additional findings of fact and conclusions of law.

I have already complimented the attorneys who participated in negotiating of a plan and the quality their work. I would like to compliment Mr. Walker and Ms. Hollis for their presentation here today.

Mr. Walker, although our exchanges have been heated sometimes, I will pay you the highest compliment that I can pay to an attorney.

If I had a worker's compensation claim, I would like you to represent me. You are a vigorous and very competent advocate, and you ought to be congratulated.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

IN RE: UNARCO BLOOMINGTON FACTORY WORKERS, *Appellant,* vs. UNR INDUSTRIES, INC., et al., *Appellees.*	No. 89 C 5220 Chicago, Illinois July 11, 1989 4:30 p.m.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. MORAN
July 11, 1989

* * *

K. JOSEPH SNYDER, RPR, CM
Official Reporter
219 S. Dearborn Street, Room 2342
Chicago, Illinois 60604

THE COURT: . . . There are warrants trading, there are people making decisions to sell or to buy or to provide supplies and everything else on the basis of the plan being in place. To suddenly—

What, really, a stay is is a temporary injunction against the plan that is presently in the process of being put in place or at least being acted upon by a lot of people.

* * *

MS. HOLLIS: Your Honor, there is no dispute here that stock has not been transferred pursuant to this plan. All that we have

are some insiders that got some warrants, a very small part of the equity of this company. There is not even a trust established which is the core of this plan yet.

MR. GAYNOR: There are thousands of public shareholders. Every share of stock was entitled to a warrant. The day after the NASDAC began trading on the Monday after the 2nd, they started trading them on a one-issue basis, and the warrants have been issued. There are thousands. I can't tell you myself how many thousands, but it is not a few insiders. There are thousands of shareholders in this company.

* * *

MS. HOLLIS: The fact that stock is traded proves nothing. Stock was traded all through the bankruptcy proceeding. There are speculators. If we had a stay on the date the confirmation order was entered, that wouldn't prohibit stock from trading.

THE COURT: Well, we are not just talking about stock. We are also talking about warrants that are in the hands of all the stockholders.

MS. HOLLIS: But we don't know if those warrants were traded and then sold back with insiders. We don't know anything about whether anyone relied on the confirmation order.

THE COURT: Then you certainly are entitled to find out, but we do know that there is an awful lot or a great volume of warrants that are out there someplace that one would anticipate people were going to trade in reliance upon a plan that has been approved.

MS. HOLLIS: We don't know that, Your Honor. There has been nothing in that affidavit to say that people traded warrants in reliance of that confirmation order.

THE COURT: —it is up to you to come forward to demonstrate that nothing has happened in reliance upon the plan that would cause innocent third parties to suffer if the whole thing came to a screeching halt, and that, therefore, there isn't any reason why you should have to put up any bond.

* * *

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNARCO BLOOMINGTON FACTORY WORKERS, *Appellants,* v. UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE., INC. and FOLDING CARRIER CORP., Debtors-in-Possession, *Appellees.*	Case No. 89 C 5220

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Appellants UNARCO Bloomington Factory Workers ("Workers") have appealed from three orders entered by the Bankruptcy Court relating to the reorganization of debtors-appellees UNR Industries, Inc. and ten of its subsidiaries ("UNR").[1] Workers appealed issues relating to an injunction ("Injunction"), an asbestos disease trust ("Trust"), and to the confirmation of the reorganization plan ("Confirmation"). Having previously disposed of the challenges to the Injunction, we remanded the case to the Bankruptcy Court to determine whether the Workers had standing to further pursue challenges to the Confirmation and the

[1]Although UNR's reorganization has resulted in a "new" company, we will refer to both the pre-bankruptcy company and the reorganized company as "UNR".

Trust. Following the Bankruptcy Court's determinations on remand, UNR now moves to end further proceedings in the Workers' appeal from the Confirmation. For the reasons set forth below, we grant UNR's motion.

I. Factual Background[2]

In July, 1982, UNR filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* UNR's principal reason for filing the petition was the excessive costs incurred in defending several thousand asbestos related personal injury lawsuits. The Workers are a class of thirty-five individuals who allege that they have been harmed by asbestos exposure during their employment with UNR. Prior to the filing of UNR's petition, all of the Workers had filed civil suits against the company alleging either intentional tort claims or claims actionable under the Illinois Workers' Occupational Disease Act. Ill. Ann. Stat. ch. 48, ¶138.2 *et seq.*

On June 1, 1992 the bankruptcy court confirmed a reorganization plan to dispose of the claims pending against UNR. The court's confirmation plan divided UNR's creditors into five classes of claimants. Class 2 claims under the plan consist of claims defined as "Workers' [sic] Compensation claims." Class 2 claims are to be paid in full in the ordinary course of the debtor's business. Class 5 claimants, on the other hand, are those who have suffered asbestos-disease injuries through contact with UNR's products. Under the confirmed plan, Class 5 claimants are to be paid out of the Trust, which consists of the reorganized UNR's stock. None of the Class 5 claimants will be paid in full from the money accumulating in the Trust. Instead, each claim will be paid on a pro-rata basis.

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[2]Because the complete factual history of this appeal is set forth in our original decision. *See Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268 (N.D. Ill. 1990) *("UNARCO I")*, we will only restate those facts necessary for the disposition of this motion.

In their appeal, the Workers challenged several aspects of the Confirmation. This court having held that two of the challenges were moot, the sole remaining issue is the Workers' contention that their claims against UNR were improperly classified as Class 5 asbestos-disease claims as opposed to Class 2 Workmen's Compensation claims. In *UNARCO I*, we did not reach the merits of this challenge, because the Workers' standing to challenge of the classification was "predicated on the assumption that the Workers' in fact are classified only as Class 5 claimants." *UNARCO I*, 124 B.R. at 282. However, the bankruptcy court had not determined whether the Workers had Class 2 or Class 5 claims. Because we determined that "if the Workers are Class 2 claimants, entitled to payment of their claims, in full, then they would appear to have nothing to complain about in this appeal," we remanded the case to the bankruptcy court to conduct an evidentiary hearing on what type of claim the Workers held. *UNARCO I*, 124 B.R. at 282.

After engaging in a thorough analysis of this issue, the bankruptcy court determined that all but one of the Workers possessed both intentional tort causes of action and causes of action under the Illinois Occupational Disease statute. The court found that the occupational disease claims constituted Workmen's Compensation claims and would fall within Class 2, while the intentional tort claims properly fell within Class 5. Thus, the court found that most Workers possessed both Class 2 and Class 5 claims, and one worker held only a Class 5 claim.

II. Discussion

In order to demonstrate that an individual has standing to challenge a bankruptcy order on appeal, the individual must demonstrate that the order diminishes the person's property or otherwise impairs his personal rights. *In re Joseph Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992). Here, an individual worker obvi-

ously cannot show that his rights have been impaired by being unfairly classified only as a Class 5 claimant, if he already has been classified as a Class 2 claimant. Those Workers who alleged claims under the Illinois Occupational Disease statue were classified as Class 2 claimants. These Workers then, all of whom also have Class 5 claims, lack standing to appeal the Confirmation of the ground that their claims were improperly classified.[3] Accordingly, we grant UNR's motion to end further proceedings in the Confirmation appeal with respect to those Workers holding Class 2 claims.[4]

The Workers contend that even if proceedings in the Confirmation appeal should end with respect to Workers with Class 2 claims, one worker, Donald Murphy, holds only a Class 5 claim and therefore has standing to continue the appeal. We disagree. Here, Donald Murphy holds only a Class 5 claim, because he alleged an intentional tort claim, but did not assert a claim under the Illinois Occupational Disease statute. Accordingly, classification of his claim presents no issue on appeal.

---

[3]This is true despite the fact that these Workers also asserted tort claims which fell under Class 5. In Illinois, workers may assert both a Workmen's Compensation and an intentional tort claim at the same time and defer election until payment is actually made on either claim. Far from suffering from unequal treatment under this classification system, then, these Workers have the highest level of flexibility in seeking compensation for their injuries. Moreover, we cannot imagine that the Workers ever contended that their tort claims should properly have been categorized as Class 2 claims, since tort claims are expressly excluded from Workmen's Compensation.

[4]We reject the Workers' assertion that "[i]mplicit in this Court's observation that Workers holding Class 2 claims may not have standing is the assumption that they will be paid in full." The issue here is whether the Workers would be permitted to pursue claims properly classified as Class 2 claims. Regardless of whether the Workers' are paid in full on their Class 2 claims, they will, in fact, be able to pursue those claims.

III. Conclusion

For the foregoing reasons, we grant UNR's motion to end further proceedings on the Workers' appeal of the Confirmation.[5] It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

Dated: 12-10-92

[5]The bankruptcy court having ruled that all Workers have Class 5 claims, and proceedings having been ended in the Confirmation appeal, we direct the parties to notify the Court of any matters presently pending before it and of how they wish to proceed.

APPENDIX O

The Constitution of the United States of America

ARTICLE I

SECTION 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 8

[1] The Congress shall have Power. . .

[4] To establish. . . uniform Laws on the subject of Bankruptcies throughout the United States;

SECTION 8[18]

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE III

SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2[1]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Code Annotated

TITLE 28

SECTION 1254

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme court by the following methods:

(1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

SECTION 1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

SECTION 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

SECTION 1334

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

SECTION 158(a), (c) & (d)

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * *

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

TITLE 11

SECTION 101(5)

"claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

SECTION 363(M)

Use, sale or lease of property

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

SECTION 1129

Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable;

(5) (A) (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interest—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of the section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interest—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met

with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance. [Bolding emphasis added]

Bankruptcy Rules

PART VIII

Appeals to District Court or Bankruptcy Appellate Panel Rule 8001, Manner of Taking Appeal; Voluntary Dismissal

(a) Appeal as of Right; How Taken. An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. Failure of an appellate to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to the appropriate Official Form, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

Supreme Court, U.S.
FILED
SEP 26 1994
OFFICE OF THE CLERK

No. 94-366

IN THE

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR., INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., AND FOLDING CARRIER CORP.,

DEBTORS-IN-POSSESSION.

UNARCO BLOOMINGTON FACTORY WORKERS,

PETITIONERS,

V.

UNR INDUSTRIES, INC., ET AL.,

DEBTORS-RESPONDENTS,

AND

TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS THE TRUSTEES OF THE UNR ASBESTOS-DISEASE CLAIMS TRUST

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QUESTIONS PRESENTED

1. Whether, in spite of uniform authority to the contrary in the eight Circuit Courts of Appeals that have considered the issue, "separation of powers" forbids a determination that a confirmed plan of bankruptcy reorganization has been so substantially consummated that petitioners' challenges to the plan should not be considered.

2. Whether petitioners, who are not future claimants, have standing to contest the bankruptcy court order enjoining future claimants from suing the reorganized entity.

3. Whether the court of appeals correctly concluded that the treatment of future asbestos-disease claims under the reorganization plan confirmed by the bankruptcy court accorded with both the constitutional "case or controversy" requirement and the Bankruptcy Code definition of claims.

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STATEMENT OF THE CASE

This case concerns the disposition of appeals from bankruptcy court orders, entered in 1989 and 1990, confirming and implementing the plan of reorganization for UNR Industries, Inc. and its subsidiaries and affiliates (collectively "UNR").

In July 1982, UNR had filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code due, in large part, to the costs of defending some 17,000 asbestos-related tort and wrongful death suits then pending against UNR. (I-2). Although UNR's involvement in the manufacture and sale of asbestos had ceased in the early 1970s, because of the long latency period from exposure to manifestation of asbestos-related disease, another 30,000 to 120,000 such suits were predicted. *Id.* The assets of UNR would have been consumed by litigation of even a fraction of these asbestos-disease claims. Appendix I, Item 1.

The various committees of existing creditors of UNR and a Legal Representative appointed by the court to represent future asbestos-disease claimants negotiated a reorganization plan with UNR. All classes of creditors, including asbestos-disease claimants, voted overwhelmingly in favor of the plan. (K-5).

After notice to creditors and other parties in interest, the bankruptcy court conducted an evidentiary hearing as to whether the plan should be confirmed. (J-1). Based upon the evidence presented, the bankruptcy court determined, among other things, that each holder of a claim would receive under the Plan value that was "not less than the amount that such holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Code." (J-2).

The plan of reorganization included the following elements relevant to the petition:

1. The UNR Asbestos-Disease Claims Trust was established, funded by 63 percent of UNR's stock, for the benefit of holders of Asbestos Disease Claims, including those persons who had not yet manifested asbestos disease ("future claimants");[1]

2. A permanent injunction was entered June 1, 1989 against suits by asbestos-disease claimants against the Debtors or the reorganized UNR.

The injunction order was entered only after extensive efforts to provide notice through national media, followed by mailed notices to notify persons who might have asbestos-disease claims. (K-1 to K-2). After a hearing, the bankruptcy court determined that these efforts "constitute[d] the best notice possible under the circumstances of this case to those who might be affected by the Injunction and effectively afforded an opportunity to object and be heard to those who might be affected by the Injunction." (K-2). The bankruptcy court further found that, without the injunction, UNR would be unable to successfully reorganize, and that the

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1 Without reaching any determination whether future claimants had "claims" within the meaning of the Bankruptcy Code, the bankruptcy court approved a plan providing that future claimants would have the same rights against the Trust as existing claimants and enjoined future claimants as well as existing claimants from proceeding against the reorganized debtor. Any scheme which left future claimants free to sue the reorganized debtor would have doomed a reorganization to failure since the debtor did not have the resources to pay those claims.

Plan made adequate provision for all asbestos-disease claimants. (K-5).

Petitioners are a group of forty-eight former employees (or their representatives) of UNR's plant in Bloomington, Illinois, who have asserted asbestos disease claims against UNR both as employees entitled to workers' compensation (Class 2 claimants under the Plan), and as tort claimants (Class 5 claimants under the Plan).

Seven days after entry of the confirmation order and the injunction, petitioners filed notices of appeal to the district court from both orders.[2] Eighteen days later, petitioners filed a motion with the bankruptcy court for a stay of the orders pending appeal. In the interim, New UNR had begun implementing the Plan and the public began trading the stock and warrants of New UNR. The motion for a stay was denied.

In their appeal of the injunction order, the petitioners raised their present challenges to the bankruptcy court's subject matter jurisdiction as to future claimants. (G-5). The district court determined that petitioners could not assert the rights and interests of the future claimants:

---

2 Petitioners also appealed the bankruptcy court's order approving the form of the UNR Asbestos-Disease Claims Trust (the "Trust"). The Trust agreement was subsequently modified and petitioners appealed from the order approving the modified Trust.

> [T]he Workers are affected pecuniarily only to the extent the future claimants are allowed to make claims against the money in the Trust. The Injunction Order, however, is not the vehicle by which that interest is affected. The Plan, as approved by the Confirmation Order, and the subsequent orders implementing the Trust provide the authority and procedures for future claimants to be paid out of the Trust. A finding, for whatever reason, that the bankruptcy court could not enjoin suits brought by Future Claimants would have no direct effect on whether or not the Workers would have to share Trust funds with the Future Claimants. The Workers' pecuniary injury is tied to that sharing arrangement, not to any prohibition against bringing suit.

(G-7).

The district court went on to dismiss most of the petitioners' appeal of the confirmation order as moot because it found that "the Plan has been implemented to such a degree that it would be impossible to grant relief . . . without effecting the kind of substantial and detrimental change that the mootness doctrine disallows," and "would undermine the economic foundation upon which numerous innocent third parties relied in purchasing stock and transacting business in New UNR." (G-23 to G-24). The district court concluded that certain other aspects of petitioners' appeals were not moot, including the contention that petitioners were entitled to Class 2 status, under which they would be paid in full under workmen's compensation, as well as Class 5 status, in which they would have a claim for partial payment against the Trust. Thus, if petitioners were determined to have only Class 2 claims they would be paid in full, and would have no cause to complain that UNR was reorganized, rather than liquidated, and would be indifferent to other provisions of the

reorganization plan. However, the district court determined that petitioners' classification appeal raised standing questions best resolved by the bankruptcy court. (G-24 to G-26). On remand, the bankruptcy court determined that petitioners held both Class 2 and Class 5 claims.

Upon UNR's renewal of its motion to dismiss petitioners' appeals, the district court held that the bankruptcy court's determination that petitioners held both Class 2 and Class 5 claims precluded petitioners' challenge to the Plan's classification of their claims, because petitioners received the benefits of both classes. Considering each of petitioners' six issues on appeal, the district court found that the implementation of the Trust had proceeded to a point that reversal of the Trust orders was impracticable. (F-6 to F-10). In particular, the district court determined that the revisions of Trust procedures proposed by petitioners were no longer possible in light of the irreversible decisions made by thousands of claimants to settle their claims under existing procedures: "[C]laimants made decisions about which liquidation option to elect based upon the approved claims procedures, and Trustees liquidated claims and paid out millions of dollars as calculated and required under the Trust Order."[3] (F-5).

Petitioners appealed this and the district court's prior holdings to the Seventh Circuit Court of Appeals. Appellees UNR and the Trustees supplemented the record to demonstrate the irreversible nature of the transactions taken

---

3 Claimants who have been paid include claimants who were future claimants at the time of plan confirmation.

in reliance on the existing plan and Trust procedures, including:

- More than 47 million shares of common stock had been issued;
- Payments of more than $165 million in dividends had been made;
- The Trust had processed the claims of approximately 105,000 claimants who had opted for a flat fee settlement and had paid to them more than $35 million;
- The Trust had begun individualized resolution of other claims;
- The Trust had expended more than $9 million to establish and maintain its claims resolution facility;
- Settlements had been reached between UNR and its insurers for approximately $62 million;
- The Trust had elected a tax status and UNR received a $90 million tax benefit;
- Numerous UNR subsidiaries had been dissolved, merged or sold;
- More than 81,000 claimants had released their claims.

Appendix I, Items 2, 3 and 4.

The court of appeals held that, although these and other actions taken in reliance on the confirmed plan did not render it impossible as a theoretical matter to provide some relief on petitioners' appeals, they did make it impossible to do so without substantial prejudice to persons who had relied on the confirmed and substantially consummated plan of

reorganization. (C-3 to C-4). In light of these facts, the court concluded that it would be inequitable and imprudent to undertake the wholesale revisions required, assuming, arguendo, that there were any merit whatsoever to petitioners' substantive contentions. (C-5 to C-8).[4]

---

4 Petitioners filed a petition for rehearing and suggestion for rehearing en banc, substantially on the grounds now asserted in their petition for certiorari. The petition for rehearing was denied by Opinion decided May 27, 1994, no active judge having requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel having voted to deny rehearing. (A-1).

REASONS FOR DENYING THE WRIT

I. THE DENIAL OF PETITIONERS' APPEALS BY THE COURT OF APPEALS PRESENTS NO SEPARATION OF POWERS ISSUES.

A. The Court of Appeals Followed Well-Established Prudential And Equitable Principles.

Every Court of Appeals to have considered the issue has concluded that substantial consummation of a plan of reorganization bars challenges to reorganization-related appeals. *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (citing *In re Chateaugay Corp.*, 10 F.3d 944, 952-54 (2d Cir. 1993)); *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047-49 (7th Cir. 1993); *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981); *Miami Ctr. Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1554-55 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-50 (D.C. Cir. 1986)). *See also Rochman v. Northeast Util. Serv. Group*, 963 F.2d 469, 471-72 (1st Cir.) (noting that mootness doctrine facilitates the "important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court'") (quoting *In re AOV Indus.*, 792 F.2d at 1147), *cert. denied*, 113 S. Ct. 304 (1992); *First Union Real Estate & Mortgage Inv. v. Club Assoc.*, 956 F.2d 1065, 1070 (11th Cir. 1992) (affirming dismissal of bankruptcy appeal as moot because "a number of investors, who were not parties to th[e] case, had committed new funds to the [reorganization plan] with the expectation of receiving a preferred return on their investments"); *In re Block Shim Dev. Company-Irving*,

939 F.2d 289, 291 (5th Cir. 1991) (holding that reversal of reorganization plan was not possible because payments had already been disbursed to third parties and every transfer contemplated by plan was completed); *Central States' Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988) (affirming the dismissal of a bankruptcy appeal as moot because the relief sought "would require the undoing of financial transactions involving third parties, not participants in this litigation").

In the opinion below, the Seventh Circuit suggested that the familiar doctrine would more precisely be described by other terminology. All of the circuits that have addressed the issue, however, including the court below, have agreed that the inquiry involves prudential and equitable concerns rather than the Article III question of whether the controversy is live. *E.g.*, *Manges v. Seattle-First Nat. Bank*, No. 93-7328, 1994 WL 421596, at *3 (5th Cir. Aug. 29, 1994) ("Many courts . . . have employed the concept of 'mootness' to address equitable concerns unique to bankruptcy proceedings. In this context, 'mootness' is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate court that there is a point beyond which they cannot order fundamental changes in reorganization actions.").

Petitioners mistakenly analogize the Seventh Circuit's prudential decision that UNR's confirmed and implemented plan of reorganization ought not be undone to the doctrine of abstention. Abstention has nothing to do with this case.

As the cases cited by petitioners make clear, the abstention doctrine is exclusively concerned with implementing federalism; the doctrine does not presume that the plaintiffs are not entitled to federal relief, it simply refers them to a state forum. *See, e.g.*, *Colorado River Water*

Conservation Dist. v. United States, 424 U.S. 800, 814-16 (1976) ("Our decisions have confined the circumstances appropriate for abstention to three general categories[:] . . . cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law[;] . . . where there have been presented difficult questions of state law bearing on policy problems . . . whose importance transcends the result of the case then at bar [; and] where . . . federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings . . . , or collection of state taxes.") (citations omitted); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) ("Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.'") (quoting *Louisiana Power & Light Co. v. Thibidaux*, 360 U.S. 25, 29 (1959)). These concepts played no part in the decision below.

Bankruptcy proceedings are an exclusively federal proceeding in which the rules and principles of equity are central. *Pepper v. Litton*, 308 U.S. 295, 304 (1939). It is these rules and principles of equity, and not federalism concerns, which appellate courts invoke in declining to hear appeals from bankruptcy court orders where doing so would upset implemented plans of reorganization. *See First Union Real Estate & Mortgage Inv. v. Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("[t]he test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him") (citations omitted); *In re AOV Indus.*, 792 F.2d at 1147 ("[e]ven when the moving party is not entitled to dismissal on article III grounds, common sense

or equitable considerations may justify a decision not to decide a case on the merits") (citations omitted).

Indeed, the reasoning of these cases reflects application of traditional equitable principles. *See In re Envirodyne Indus., Inc.*, 29 F.3d 301 (7th Cir. 1994) (stating that an equitable mootness doctrine "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties") (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375 (1977)).

Even the academic critics of the Supreme Court's abstention decisions, upon whom petitioners rely, agree that traditional equitable doctrines counseling against granting certain relief present no separation of powers questions. *See* Redish, Martin H., *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71, 91 (1984) ("many [of the harms prevented by the abstention doctrines] could be avoided more simply by resort to such devices as . . . traditional equitable principles"); Shapiro, David L., *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 545 (1985).

Petitioners suggest that, by failing to decide the appeal from a bankruptcy order on the merits, the court of appeals violated the jurisdictional statute. Pet. at 14. This is nonsense. Under petitioners' mistaken view, every application of a prudential doctrine by an appellate court to decline to decide an appeal on the merits would violate jurisdictional commands. The statute granting jurisdiction to district courts over appeals from final orders of bankruptcy courts, 28 U.S.C. § 158(a), contains nearly identical language as does the statute conferring jurisdiction to courts of appeal over appeals from final orders of the district courts, 28

U.S.C. § 1291. Petitioners' position would bar courts of appeal from ever declining to hear an appeal on prudential or equitable grounds, and would require overruling of decades of legal precedent in this and other courts. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 & n.6 (1979) (stating that even where a plaintiff satisfies Article III requirement of case or controversy court may decline to decide case under prudential standing doctrines); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (stating that under ripeness doctrine, courts will decline to consider case where administrative action is insufficiently complete); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (summarizing rules developed by Supreme Court to avoid decision of constitutional questions "confessedly within its jurisdiction"); *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1491-92 (10th Cir. 1993) (summarizing applications of prudential mootness doctrine to requests for prospective equitable relief).

B. The Court of Appeals' Fact-Intensive Determination Is An Inappropriate Subject For The Writ.

The Seventh Circuit, in common with other courts of appeals, applies a fact-specific inquiry into whether relief can be granted without unduly affecting the overall reorganization. *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992). *See also First Union*, 956 F.2d at 1069 n.11; *In re AOV Indus.*, 792 F.2d at 1148. This focus on the particular facts means that any review of the holding by the court of appeals would be of interest only to the parties.

The record clearly supports the conclusion of the court of appeals that the extensive implementation of UNR's reorganization plan made reversing the reorganization order impractical and unfair:

> Since the plan went into effect, more than 15 million shares of New UNR have been distributed to its creditors and pre-petition shareholders and are trading on public exchanges. Warrants for additional stock have been issued and are trading. . . . Corporate acquisitions and divestitures (not to mention ordinary commercial transactions) have occurred; tax consequences (including a $90 million income tax benefit) have been realized; large insurance settlements have been disbursed; lawsuits have been dismissed.

In re UNR Industries, Inc., 20 F.3d 766, 769 (7th Cir. 1994). The Court recognized that granting petitioner's request to "undo[] the identification of persons entitled to make claims on the assets in the Trust" would have "ramifications for the rest of the plan" that would be extraordinary disruptive. The potential ramifications would include reallocating stock to other UNR creditors, reallocating insurance proceeds, and suddenly revaluing the 15 million shares of New UNR stock "which current holders purchased on the assumption that all asbestos payments would be borne by the Trust." *In re UNR Industries, Inc.*, 20 F.3d at 769. Under these factual circumstances, the court of appeals' conclusion that it would be imprudent and inequitable to reconsider the elements of the plan of reorganization is clearly correct.

II. PETITIONERS LACK STANDING TO CHALLENGE THE INJUNCTION ON BEHALF OF THE FUTURE CLAIMANTS WHOSE INTERESTS THEY OPPOSE.

At the core of petitioners' challenge to the plan of reorganization is a contention that the bankruptcy court improperly enjoined future asbestos claimants from pursuing claims against UNR. Since none of the petitioners is a future claimant, the district court concluded that petitioners lacked standing to challenge the bankruptcy court's injunction order as to future claimants.[5] Petitioners' manifest lack of standing to complain of the injunction addressed to future claimants provides a further reason to decline the review.

The district court's conclusion that petitioners lack standing to challenge the injunction as to future claimants accords with well-established principles of standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party") (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). *See also Kane v. Johns-Manville Corp.*, 843 F.2d 636, 641-46 (2d

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5 Because of its conclusion that the plan had been so substantially consummated as to preclude the relief sought by petitioners, the court of appeals found it unnecessary to address this issue.

Cir. 1988) (discussing heightened prudential standing requirements applied in bankruptcy context).

As set forth in the district court's analysis, petitioners seek to exclude future claimants from the Trust, thereby ensuring petitioners a greater pro rata share of the value of the UNR stock owned by the Trust. G-7. The irony of this is that the effect of the exclusion of future claimants could be to destroy the value of the Trust's UNR stock in which petitioners seek to share. Absent the injunction, future claimants would be free to sue UNR, thereby transforming UNR once again into an insolvent asbestos company and destroying the value of the stock owned by the Trust.[6]

Petitioners' suggestion that they would benefit from reversal of the injunction because reorganization would be rendered impossible, thereby forcing a Chapter 7 liquidation in which they would fare better because only existing creditors would receive distributions is without sound support. Pet. at 16-17. The bankruptcy court's assessment in June 1989 is irrelevant -- UNR is today a different corporation than it was then, with a whole new set of creditors, and there are thousands more asbestos-disease claimants. Petitioners' speculation, unsupported by anything in the record, that they might come out better if UNR were liquidated today cannot support standing. *See Allen v.*

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6 Unlike the challenged orders in the cases cited by petitioner (Pet. at 17.), a determination that certain or all future claimants were not subject to the injunction would not provide any direct benefit to petitioners. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805-06 (1985).

Wright, 468 U.S. 737, 757-59 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109-10 (1983).

Moreover, as the Second Circuit stated in rejecting a similarly attenuated claim for standing by an asbestos claimant challenging a similar reorganization provision for future claimants in the Manville bankruptcy, "[t]hird-party standing is of special concern in the bankruptcy context where, as here, one constituency before the court seeks to disturb a plan of reorganization based on the rights of third parties who apparently favor the plan." *Kane v. Johns-Manville Corp.*, 843 F.2d at 644. Here, not one of tens of thousands of future claimants who have asserted claims for the first time after confirmation of the plan of reorganization has initiated any challenge to the Plan or injunction.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONERS' CHALLENGES TO THE TREATMENT OF FUTURE CLAIMS UNDER THIS PARTICULAR REORGANIZATION PLAN LACKED MERIT.

Because of the mootness holding by the district court and the court of appeals' disposition of the appeal on prudential and equitable grounds, neither court fully considered petitioners' arguments on the merits--reason enough for this Court to decline to do so. *E.g.*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Even a brief review of petitioners' arguments demonstrates that they rest on fundamental factual flaws and a misapplication of applicable bankruptcy law. Essentially, petitioners are complaining: (1) that the inclusion of future claimants as Asbestos Disease Claimants diluted their pro-rata share of the assets accorded to Class 5 claimants; (2) that the Plan's provisions for future claimants violated the case or controversy requirement of Article III of the Constitution because, by definition, future claimants were not before the bankruptcy court when the orders were entered; and (3) that the Plan's provisions for future claimants treated "estimates of future tort injuries" as claims under Section 101(5) of the Bankruptcy Code, a result claimed to be at odds with holdings in other courts of appeals.

Petitioners' contention that they have been injured by the Plan's provisions for future claimants rests on a false factual premise. The bankruptcy court's factual findings included a determination that the alternative to the Plan's provisions for future claimants was Chapter 7 liquidation, and that each holder of an asbestos-disease claim was better off under reorganization. Petitioners' bare assertion that they would be better off in a liquidation scenario because UNR's assets would have been divided among existing creditors only is

unsupported by any facts in the record. The bankruptcy court found that litigation of even a fraction of the then-pending claims by asbestos-disease victims would have consumed all of the assets of UNR.

Petitioners argue at length that the bankruptcy court lacked Article III jurisdiction to confirm the Plan with its provisions for the future claimants because no case or controversy was presented. Petitioners' argument completely overlooks that this was a bankruptcy proceeding, in which the bankruptcy court exercises *in rem* jurisdiction over the disposition of the debtors' assets. *See Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648, 675-77 (1935); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206 n.13 (1983) (noting that the *in rem* jurisdiction of the bankruptcy court has been expanded under the Bankruptcy Code).

Petitioners' argument, which the court of appeals understandably found mysterious, mistakenly treats the determination of the bankruptcy court to confirm the plan as an adjudication of some entirely speculative, future dispute. This is clearly wrong. As the court of appeals stated, "Injuries attributable to past acts are certain to occur; although the identity of the victims remains to be ascertained, the existence of the injury is real enough." 20 F.3d at 770. The cases upon which petitioners rely, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), address the quite different issue of whether an individual with only a speculative future risk of injury can enjoin future conduct or assert rights of others in litigation.

In a final effort to generate an issue worthy of the writ, petitioners incorrectly assert that the court of appeals' "holding" that the asbestos-disease claims of future claimants are claims as defined in the Bankruptcy Code conflicts with holdings in other circuits. Pet. at 24-25. In fact, the cases

uniformly hold that where an asbestos claim is premised on prepetition contact with or exposure to products of the bankrupt, the claim falls within the Bankruptcy Code definition.

The purportedly conflicting holdings regarding treatment of future claims under the Bankruptcy Code reflect distinguishing factual differences in the cases under consideration rather than conflicting interpretations of the Bankruptcy Code's definition of "claim." Each of the Bankruptcy Code decisions cited by petitioners emphasizes the particular facts concerning the claims asserted in determining whether they constituted "claims" for bankruptcy purposes.[7] *E.g.*, *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277-78 (5th Cir. 1994) (determining that on the specific facts before it, in which there was an absence of contact, exposure, impact, or privity between the debtor's prepetition conduct and the claimant, claim was not discharged in bankruptcy).

The courts which have addressed the status of bankruptcy claims of asbestos-disease claimants are in accord. *In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986); *Waterman S.S. Corp. v. Aguiar*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993) (determining that a "claim" arose at the moment the plaintiffs came into contact with

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7 Two of the cases upon which petitioners premise their assertion of an inter-circuit conflict were decided not under the Bankruptcy Code, but under the former Bankruptcy Act. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *In re Mooney Aircraft, Inc.*, 730 F.2d 367 (5th Cir. 1984).

asbestos, even though their injury was not manifest until years later); *In re Eagle-Picher Indus., Inc.*, 144 B.R. 69, 71-72 (Bankr. S.D. Ohio 1992) (court defined class of future personal injury claimants in Chapter 11 case as including persons exposed to asbestos or asbestos products who as of filing date of cases did not yet have a cause of action against debtors on account of such exposure, but who will have such a right subsequently).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September 26, 1994

APPENDIX I

1. Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof, Disclosure Statement Dated March 14, 1989, Plan of Reorganization Dated March 14, 1989, and Related Documents in *In re UNR Industries, Inc.*, Nos. 82 B 9841-9845, 82 B 9847, 82 B 9849 and 82 B 9851 (Bankr. N.D. Ill.).

2. Affidavit of David E. Maxam, filed on November 15, 1993, in Supplemental Statement Regarding Mootness submitted by Appellees, the Trustees of the UNR Asbestos-Disease Claims Trust in *In re UNR Industries, Inc.*, Nos. 93-1510 and 93-2268 (7th Cir.).

3. Supplemental Affidavit of Henry Gray, filed on October 5, 1993, as Exhibit B to Brief of Debtors-Appellees UNR Industries, Inc. in *In re UNR Industries, Inc.*, Nos. 93-1510 and 93-2268 (7th Cir.).

4. Affidavit of David E. Maxam, filed on October 5, 1993, as Exhibit C to Brief of Debtors-Appellees UNR Industries, Inc. in *In re UNR Industries, Inc.*, Nos. 93-1510 and 93-2268 (7th Cir.).

Supreme Court, U.S.
FILED
OCT 21 1994
OFFICE OF THE CLERK

No. 94-366

In The
Supreme Court of the United States
October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., AND FOLDING CARRIER CORP.
Debtors-In-Possession.

UNARCO BLOOMINGTON FACTORY WORKERS,
Petitioners,
v.
UNR INDUSTRIES, INC., ET AL.,
Debtors-Respondents,
and
TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF DEBTORS-RESPONDENTS UNR INDUSTRIES, INC., ET AL.

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I. QUESTIONS PRESENTED

A. Whether Petitioners' appeal from the order of the bankruptcy court confirming the Respondents-Debtors' Chapter 11 plan of reorganization was moot.

B. Whether Petitioners, whose claims allegedly arise out of asbestos-disease diagnosed *prior* to filing of UNR's Chapter 11 case, had standing to challenge an injunction prohibiting suits by future claimants, whose claims arise out of asbestos-disease diagnosed *after* confirmation of the plan of reorganization.

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IV. STATEMENT OF THE CASE

Petitioners seek to overturn 1989 and 1990 Bankruptcy Court orders confirming a plan of reorganization, enjoining actions against the reorganized debtors and approving a trust ("UNR Asbestos-Disease Claims Trust") created pursuant to the plan for the benefit of Asbestos-Disease Claimants.

On July 29, 1982, Respondent, UNR Industries, Inc. and ten of its affiliates (collectively "UNR") filed voluntary petitions under Chapter 11 of the Bankruptcy Code, because they were unable to support the cost of defending 17,000 asbestos-related injury cases then pending. *In the Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1113 (7th Cir. 1984); Petitioners' App. at D and I-2.

Petitioners are a group of individuals alleging claims against UNR resulting from employee exposure to asbestos, before 1970, in a plant operated by a predecessor of UNR. Those claims all arise out of asbestos-disease diagnosed *before* UNR filed Chapter 11.

In the Chapter 11 case, a committee ("Plaintiffs' Committee") was appointed to represent the interests of persons, such as the Petitioners, whose symptoms of asbestos-related disease would become manifest before confirmation of a reorganization plan. Petitioners' App. at K-5. However, due to the long latency period of asbestos-related disease, there were persons who would manifest symptoms of asbestos-related disease *after* confirmation of a reorganization plan ("Future Claimants"). Those persons had interests potentially conflicting with those of the Plaintiffs' Committee's constituency. Therefore, a legal representative ("Legal Representative") was appointed to represent the Future Claimants' interests during the Chapter 11 case. Petitioners' App. at I.

In March of 1989, UNR filed a Plan of Reorganization ("Plan") which was the result of years of negotiation among representatives of trade and institutional creditors, the Plaintiffs' Committee and the Legal Representative. Petitioners' App. at J-1, J-2. Under the Plan, all of UNR's pre-petition debt, including $112 million in trade and institutional debt and over $11 billion in face amount of then existing Asbestos-Disease Claims, was eliminated. In return, creditors and the UNR Asbestos-Disease Claims Trust, received approximately 92% of the common stock of the reorganized debtor ("New UNR"). Petitioners' App. at G-2, G-3. Pursuant to 11 U.S.C. §1129(a)(7)(A)(ii), the bankruptcy court found that the Plan was in the "best interest" of the creditors, because in a liquidation creditors would be unlikely to receive anything due to the massive litigation costs associated with asbestos litigation. Order of Confirmation dated June 1, 1989.

Because New UNR stock would have little or no value if Future Claimants were free to sue New UNR, it was a condition precedent to confirmation of the Plan that, as a supplement to the injunction contained in 11 U.S.C. §524(a)(2), the Bankruptcy Court issue a separate injunction ("Injunction") permanently restraining and enjoining all entities from taking any action against New UNR. The Injunction prohibits lawsuits against New UNR by Future Claimants, regardless of whether they hold "claims" as defined in 11 U.S.C. §101(5). Petitioners' App. at K.

The Plan was accepted by 23,335 holders of Class 5 Asbestos-Disease Claims aggregating $11,428,701,921.61, representing 96% in number and amount of all such claims voted. Tr. *In re UNR Industries, Inc.*, May 31, 1989 before Bankruptcy Judge Coar at p. 284. The Plan was also accepted by 470 holders of Class 4 Unsecured Trade Claims and Other Unsecured Claims aggregating $201,709,056.70, representing 93% in number and 99% in amount of such claims. *Id.* at 283. Class 6 pre-petition shareholders of

UNR, holding more than 99% of its common stock — 2,289,970 shares — also accepted the Plan. *Id.* at 284. The Petitioners objected to the Plan. Petitioners' Objection to Confirmation of Plan, May 1, 1989.

After lengthy hearings, at which the Petitioners were the only objectors, the Bankruptcy Court entered the Injunction and an order Confirming the Plan ("Confirmation Order"). Petitioners' App. at J and K. The Injunction was docketed on June 1, 1989 and the Confirmation Order the following day, June 2, 1989. Petitioners' App. at G-2, G-3. The Petitioners appealed both the Confirmation Order and the Injunction to the District Court.

Although the Plan became effective upon docketing of the Confirmation Order, the Petitioners waited until June 29, 1989 to present a motion to the Bankruptcy Court for a stay pending appeal. Workers' Emergency Motion For Stay Pending Appeal filed with Bankruptcy Court. That motion was denied. In the interim, the Plan was implemented and the public began trading the stock and warrants of New UNR. Petitioners' App. at M-2.

On July 5, 1989, the Petitioners sought a stay of the Confirmation Order from the District Court. Workers' Emergency Motion For Stay Pending Appeal filed with District Court. The District Court denied a stay due to, *inter alia*, the absence of a likelihood of success on the merits (because the appeal had become moot) and because the Petitioners did not furnish a supersedeas bond. Tr. *In re UNR Industries, Inc.*, July 11, 1989 before District Judge Moran.

Petitioners appealed the District Court's denial of a stay pending appeal to the Seventh Circuit, and simultaneously sought a stay pending appeal. On September 5, 1989, the Seventh Circuit denied the Petitioners' request for a stay and affirmed the District Court's denial of a stay pending appeal on the grounds that the Petitioners "failed

to make a strong showing of likelihood of success on the merits" and because "*both substantial injury to other parties and the public's interest factor against a stay.*" *In re UNR Industries, Inc.*, Order Sept. 5,1989 (7th Cir. Case No. 89-2444). (emphasis added).

During the more than five years which have elapsed since the Effective Date of the Plan, numerous irrevocable steps have been taken to implement the Plan and the public has acted in reliance upon the Plan. UNR Asbestos-Disease Claims Trust Appendix I, Items 2, 3, and 4.

The District Court decided the Petitioners' appeals from the Confirmation Order and the Injunction on December 6, 1990. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268 (N.D. Ill. 1990); Petitioners' App. at G. That Court dismissed Petitioners' appeal from the Confirmation Order as moot as to all challenges, except one relating to classification of Petitioners' claims under the Plan.[1] The District Court affirmed the Injunction as it applies to Petitioners, and held that Petitioners lacked standing to appeal the Injunction as it applies to Future Claimants. *Id.* The Court found that Petitioners had standing to appeal the Injunction insofar as it prevented them from (a) suing insurance carriers with whom UNR had settled and (b) pursuing their statutory occupational disease claims against New UNR. However, the Court went on to conclude that Petitioners had no rights against the settling insurers and no right to pursue their statutory occupational disease claims against New UNR. *Id.* Petitioners' App. at G-17 - G-20.

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[1] The Court remanded the case to the Bankruptcy Court to determine wether Petitioners' claims under the Illinois Occupational Disease Act, 820 ILCS 310/1 *et seq.*, fall within Class 2 or Class 5 of the Plan. The issue of proper classification of Petitioners' claims under the Plan is again before the Bankruptcy Court, after a second appeal and remand of this issue from the District Court.

On December 29, 1992, the District Court's judgment dismissing the Petitioners' appeal from the Confirmation Order as moot was docketed, as was that court's judgment dismissing the Petitioners' appeal from the Injunction for lack of standing. Petitioners' App. at E-4. The Petitioners appealed those judgments to the Seventh Circuit. On April 5, 1994, the Seventh Circuit Court of Appeals affirmed the District Court's dismissals of the Petitioners' appeals. Petitioners' App. at B. Petitioners now seek review of the Seventh Circuit's decision by writ of certiorari.

V. REASONS FOR DENYING THE WRIT OF CERTIORARI

This case does not satisfy Rule 10 of the Rules of The Supreme Court of the United States, because it does not present special and important reasons for review on writ of certiorari. If certiorari were granted, the only issues before the Court would be garden variety mootness and standing.

A. Petitioners' Challenge to the Plan is Barred by Principles of Mootness.

The Petitioners' appeal of the Confirmation Order was dismissed by the district court as moot and that dismissal was affirmed by the Seventh Circuit. Therefore, if certiorari were granted, the issue before this Court simply would be whether those appeals were moot. No separation of powers issues would be involved.

Although the Seventh Circuit found that the case was not technically moot, because it hypothesized that granting some form of relief would be possible, that court recognized that undoing all that occurred based on the Plan is "impossible". Therefore, the Court concluded that the Plan should not be disturbed. *In re UNR Industries, Inc.*,

20 F.3d 766, 768 (7th Cir. 1994); Petitioners' App. at C-3 - C-4.

While the Court eschewed the label "equitable mootness", its conclusion is consistent with that of every Court of Appeals to have considered the issue of whether substantial consummation of a plan of reorganization precludes a challenge to the order confirming the plan. *See* cases cited in Brief in Opposition of Respondents the Trustees of the UNR Asbestos-Disease Claims Trust at 8-9 and *Matter of Manges*, 29 F.3d 1034, 1038, n6 (5th Cir. 1994), citing the opinion of the Seventh Circuit in the instant case with approval and characterizing that opinion as:

> [r]ecognizing the *virtually universal* principle that 'a plan of reorganization once implemented should be disturbed only for compelling reasons'....

(Emphasis added.)

Neither the question of whether the case is moot in the technical sense nor the issue of whether the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties should be called "equitable mootness", are important questions of federal law demanding this Court's attention. *See In re Environdyne Industries, Inc.*, 29 F.3d 301 (7th Cir. 1994).

Petitioners' contrived effort to transform this unremarkable mootness ruling into a violation of Constitutional separation of powers principles is without substance. The Court of Appeals did not deny Petitioners their right of appeal nor did it abstain from exercising jurisdiction. On the contrary, the Court *ruled* that under the facts and circumstances of this case concerning implementation of the Plan, equitable mootness principles precluded overturning the Plan at this late date. Because the Court found that the

application of equitable mootness principles disposed of the case, it was unnecessary to reach other issues. That is often the case in federal appeals, and separation of powers principles are certainly not thereby violated. Brief in Opposition of Respondents the Trustees of the UNR Asbestos Disease Claims Trust at 11-12.

B. Petitioners Lack Standing to Challenge the Injunction

The District Court dismissed the Petitioners' appeal of the Injunction for lack of standing. As the court correctly pointed out, the Plan, not the Injunction, provides for "future claimants to be paid out of the Trust." *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 274 (D.C. Ill. 1990) Petitioners' App. at G-7. Since the Injunction is not the "vehicle" by which the Petitioners' interests are affected, the Court concluded "the Workers do not have standing to challenge the Injunction Order, insofar as it concerns the prohibition of suits brought Future Claimants." *Id.* The Court's decision is in accord with well settled principles of standing. A party cannot base its claim upon the rights of others. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 644 (2nd Cir. 1988). Indeed, the very cases relied upon the Petitioners in connection with the "Article III" argument hold that persons such as Petitioners have no standing to assert the rights of other individuals. Petitioners' Brief 20-21.[2]

In affirming the District Court, the Seventh Circuit found it unnecessary to separately address the Injunction. The Court concluded that it would be improper to upset the Plan. Since the Injunction's sole purpose was to insure the

[2] Although five years have passed since confirmation of the plan, not one of the more than 40,000 persons who claim to have manifested asbestos-related diseases during that period and were, therefore, Future Claimants at the time of confirmation, has contested the validity of either the Injunction or Plan.

viability of the Plan, the decision to uphold the Plan was dispositive of the entire case. Petitioners' App. C-8. Clearly, the Court was correct. Since the Plan cannot be disturbed, Petitioners' challenge to the Injunction is meaningless.

C. Petitioners' Challenge to the Plan's Provision for Future Claimants is Without Substance

Because this case was dismissed on mootness grounds, the courts below also found it unnecessary to address in detail Petitioners' argument that the bankruptcy court was powerless to provide for and to enjoin future claims. The Court of Appeals appropriately characterized this argument as "mysterious". Petitioners' App. C-6. Indeed, it is.

The Bankruptcy Court, as a court of equity, acting pursuant to 28 U.S.C. §1334, unquestionably possessed *in rem* jurisdiction to approve the allocation of assets to a trust in satisfaction of asbestos-related claims and to issue an injunction to prevent post-confirmation actions that would undermine the reorganization. *In re W.T. Grant,* 20 B.R. 186, 189 (S.D.N.Y. 1982), *aff'd,* 699 F.2d 599 (2nd Cir.) *cert. denied* 464 U.S. 868 (1988); *In re Johns-Manville Corporation,* 801 F.2d 60 (2nd Cir. 1986). Contrary to the Petitioners' assertions, these actions neither adjudicate future disputes nor conflict with the decisions of other circuits. Petitioners' effort to elevate these routine bankruptcy order to constitutional status is without substance.

VI. CONCLUSION

For the reasons hereinabove set forth, the Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

A. Tr. *In re UNR Industries, Inc.*, May 31, 1989 before Bankruptcy Judge Coar at p. 284.

B. Petitioners' Objection to Confirmation of Plan, May 1, 1989.

C. Workers' Emergency Motion for Stay Pending Appeal filed with Bankruptcy Court.

D. Tr. *In re UNR Industries, Inc.*, July 11, 1989 before District Judge Moran.

E. *In re UNR Industries, Inc.*, Order September 5, 1989 (7th Cir. Case No. 89-2444).

F. Order of Confirmation dated June 1, 1989.